S221958

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

MICHAEL RAFAEL CANIZALES, et al.,

Defendants and Appellants.

Appeal from the Superior Court of San Bernardino County
Honorable Steven A. Mapes, Trial Judge
San Bernardino County No. FVA1001265
Fourth Appellate District, Division Two No. E054056

APPELLANT WINDFIELD'S REPLY BRIEF

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ARGUMENT: THE JURY WAS NOT PROPERLY INSTRUCTED ON THE "KILL ZONE" THEORY OF ATTEMPTED MURDER.

I. THE INSTRUCTION SHOULD NOT HAVE BEEN GIVEN, BECAUSE WINDFIELD'S FIVE SHOTS AT A DISTANCE OF AT LEAST 100 FEET DO NOT SUPPORT THE INFERENCE THAT HE INTENDED TO KILL DENZELL PRIDE BY KILLING EVERYONE AROUND PRIDE.

In his opening brief, Windfield argued there was insufficient evidence to support an instruction on the kill zone theory. (WBOM 8-22.) In the answer brief, respondent asserts that there was a kill zone, because there was an area that included Denzell Pride and Travion Bolden, and the five shots Windfield fired were enough to kill two people. (AB 16-19.)

Respondent's argument is wrong, because respondent's notion of a kill zone is far too loose. Respondent ignores the importance to the reasoning in *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*) of the defendants' use of devastating force.

In *Bland*, two defendants used handguns to fire a "flurry of bullets" into the passenger compartment of a car at "point-blank range." (*Bland* at 318, 331-332.) They killed the driver and severely injured the two passengers. (*Id.* at 318.) The Court held that the defendants' use of force "virtually compels" the inference that they intended to kill everyone in the car. (*Id.* at 330.) Therefore, the defendants' use of force supported attempted murder convictions as to the passengers. (*Id.* at 331.)

The discussion in *Bland* quotes extensively from *Ford v. State* (1993) 330 Md. 682 (*Ford*). In explaining the basis for an inference that the defendant intended to kill everyone around the primary target, *Ford* speaks of devastating force. As examples of such force, it mentions a

person who places a bomb on a commercial airplane and so ensures the death of all the passengers and a defendant who drives by a group of three persons and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. (*Ford* at 716-717, quoted in *Bland* at 329-330.) And, when *Bland* identified California decisions that could be considered kill zone cases although they did not use that term, those decisions also involved overwhelming force. In *People v. Vang* (2001) 87 Cal.App.4th 554 (*Vang*), the defendants used assault rifles and a shotgun to assault a duplex with such ferocity that "[a]t least 50 bullet holes dotted the front of the duplex" and there was extensive gunfire damage throughout each unit's interior. One person was killed and another severely injured. The defendants then used the same high-powered assault rifle to spray bullets at an apartment in a different location and caused extensive damage to the residence, severely injuring two victims. (*Id.* at 558, cited in *Bland* at 330.) In *People v. Gaither* (1959) 173 Cal.App.2d 662 (*Gaither*), the mode of attack was poisoned candy mailed to a home. The candy contained enough arsenic to kill 75 persons; four people ate the candy and became violently ill. (*Id.* at 666, cited in *Bland* at 330.)

Bland quotes the following sentence from *Ford*: "This situation is distinct from the 'depraved heart' [i.e., implied malice] situation because the trier of fact may infer the actual intent to kill which is lacking in a 'depraved heart' [implied malice] scenario." (*Bland* at 330, quoting *Ford* at 717, bracketed phrases added by *Bland*.) Clearly, the thing that makes the situation "distinct" is the use of overwhelming force. (See *People v. Perez* (2010) 50 Cal.4th 222, 232 ["*Bland's* kill zone theory of multiple attempted murder is necessarily defined by the nature and scope of the attack."].)

Respondent ignores the role of devastating force in kill zone reasoning. In respondent's view, a defendant creates a kill zone if he uses force that is merely sufficient to kill everyone in a zone. Thus, respondent

argues that Windfield created a kill zone because he fired five shots when the zone contained two people. (AB 16-19.) This is not the kind of force discussed in *Bland* and *Ford*. Respondent sets the bar for existence of a kill zone too low. Respondent's approach should be rejected.

Here, Windfield used a handgun to fire five shots at Denzell Pride at a distance that a detective estimated as approximately 100 feet (3 RT 722) but an investigator measured with a rolatape as 160 feet (Exhibit 76, letter dated 4-2-11, paragraph 1). In the circumstances, Windfield lacked the capability of creating a swath of destruction such as might be achieved with a bomb, a sustained blast of fire from an assault rifle, or sustained shooting from multiple handguns at close range. Whether Windfield created a kill zone may also be judged by his results. In contrast to *Bland*, *Vang*, and *Gaither*, in all of which there were multiple victims, he hit no one except the unfortunate Ms. Cooksey, who was a stranger to him. Windfield's failure to injure anyone he may have meant to kill belies the inference he intended to kill all the people around Pride.

Furthermore, in *Bland* and *Ford*, the defendant's use of devastating force is a means to the end of killing a primary victim. In *Bland*, the defendants fired a flurry of bullets into the passenger compartment of the car because they wanted to kill the driver, a member of a rival gang. (*Bland* at 318.) In the examples given in *Ford*, the assailant placed a bomb on an airplane because he wanted to kill one of the passengers, and he sprayed the group of three persons with assault rifle fire because he wanted to kill one of the persons. (*Ford* at 716.) *Ford* stated that "the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming

everyone in that victim's vicinity." (*Ford* at 716, quoted in *Bland* at 329.)[1]

Although respondent states that Windfield fired five shots "to ensure the death of Pride and the only other person standing in the kill zone, Bolden" (AB 16), respondent fails to explain how killing Bolden would have assisted Windfield in killing Pride. Given Windfield's distance from Pride, his choice of weapon, and his firing of five shots, trying to kill everyone around Pride would have been contrary to his purpose of killing Pride. And there was no reason for Windfield to create a zone of destruction around Pride. Windfield knew who Pride was. He knew where Pride was, because he yelled when he saw him. (E.g., 1 RT 205-206.) He shot at Pride. When his first shot did not hit Pride, he fired a second shot. When the second shot did not hit Pride, he fired a third shot, and so forth until he had fired five shots. Any shot not aimed at Pride specifically would have detracted from Windfield's goal of killing Pride. Thus, it is unreasonable to infer that Windfield intended to create a kill zone around Pride to ensure the death of Pride.

Respondent cites several decisions to show that five bullets fired at a target can constitute a kill zone. (AB 20-21.) Most of the decisions respondent cites do not aid respondent's argument as to Windfield, however, primarily because they do not involve the distance of 100 feet or more between shooter and target that is present here. In one of them, *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, the shooter stood four feet away from the three victims, raised his right arm, and fired five shots at the

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[1] Although a kill zone need not have a primary target (*People v. Stone* (2009) 46 Cal.4th 131, 140), there is no evidence here that, if Windfield created a kill zone, he did so for its own sake, as, for example, in the Boston Marathon bombing. The theory described in the kill zone paragraph is that Windfield intended to kill everyone in a zone around Pride to ensure he killed Pride. (2 CT 233.)

victims, killing one, wounding one, and missing a third who ran away when the shooting started. The appellate court rejected a claim of insufficient evidence of attempted murder of the wounded victim and the victim who ran away, stating that the defendant "by firing five shots at close range, hitting two victims and missing one, intended to kill all three." (*Id.* at 1437.) The opinion, which was written the same year as *Ford* was decided, does not mention a kill zone, and there is no reason to think that the court found sufficient evidence of anything other than three distinct, concurrent intents to kill. (*Id.* at 1430-1431.) Here, the jury could have found that Windfield intended to kill Bolden specifically in addition to Pride, but, for purposes of discussion of the kill zone instruction, the assumption is that the jury rejected that finding and instead relied on the kill zone theory. Nothing in *Gutierrez* supports the inference that Windfield could be found to have intended to kill everyone around Pride.

In *Harrison v. State* (2004) 382 Md. 477, the court found that a shooting in an inner-city basketball court created a kill zone. Defendant Harrison fired six shots, but there was a second shooter with two guns. Ballistics confirmed that three guns were used, and the opinion does not show the total number of shots fired or whose bullet hit the bystander who the prosecutor claimed was the victim of attempted murder. (*Id.* at 484.) *Harrison* does not support the inference that five shots fired at a target one hundred or more feet away creates a kill zone.

Other decisions respondent cites involve shootings at very close distances nothing like the distance of 100 feet or more in this case. In *Ruffin v. U.S.* (D.C. 1994) 642 A.2d 1288, five shooters in a car fired 10-15 shots at another car they had pulled alongside, killing one occupant and wounding two others. (*Id.* at 1292, 1298.) In *Hunt v. United States* (D.C.1999) 729 A.2d 322, victim Hayden was seated in the driver's seat of a parked car and victim Gilchrist was standing outside the passenger's

window when the defendant stood at the driver's window and fired 20-30 shots, killing Hayden and wounding Gilchrist. (*Id.* at 323-324.) In *United States v. Willis* (1997) 46 M.J. 258, the defendant reached around a partially open office door and fired three shots into the area of the office where he knew his aunt and uncle were, intending to kill his aunt. The court found he had created a kill zone sufficient to support a conviction of attempted murder of his uncle. (*Id.* at 259-261.) In *Walls v. U.S.* (D.C. 2001) 773 A.2d 424, the defendant fired "several shots" at two men after they passed each other on a staircase, hitting one of them. The court upheld the jury's finding of specific intent to kill the two men. It explained, "Under the concurrent intent doctrine, a specific intent to kill each individual may be imputed to a defendant who fires multiple shots at two or more persons at close range." (*Id.* at 426.) None of these decisions provides reason to find that Windfield's five shots at a distance of 100 feet or more supports an inference that he intended to kill everyone around his primary target.

One decision cited by respondent is not so easily distinguished. *Harvey v. State* (Md. Ct. Spec. App. 1996) 111 Md.App. 401 involved a shooting incident in the parking lot of an apartment complex. The shooter was directed by his companion, Kitty Cat, to fire at one person in a crowd. He fired five shots but hit no one. Then Kitty Cat directed him to fire at someone else. He fired four shots at that person. He failed to hit that person, but one shot hit someone else. (*Id.* at 404-405.) The court held that the jury could have found a kill zone that included the person hit. It explained, "What was unleashed toward the crowd ... was not a single, well-aimed bullet but a fusillade of no less than five shots that sprayed the area." (*Id* at 435.) It is unclear why the court referred to "five shots," when the first volley of five shots did not hit anyone, and the second volley, which included the shot that hit the victim, was only four shots (*id.* at 405), but, given the tenor of the opinion, the discrepancy probably makes no

difference. Although the distance between the shooter and the victim may not have been as great as in Windfield's case, it seems likely that, if the *Harvey* court viewed the facts in Windfield's case, it would find a kill zone.

But, under California law as discussed in *Bland*, the *Harvey* decision is simply wrong. The four or five shots in *Harvey* are not at all like the "flurry of bullets" in *Bland* or the paradigmatic examples in *Ford*. The *Harvey* court does not explain why its finding that there was a kill zone is not simply speculation. It does not explain how the jury could reasonably have found the interpretation that the defendant created a kill zone more likely than the interpretation that the shooter shot at the designated target but failed to hit him. Like the holding of the Court of Appeal in Windfield's case, the holding in *Harvey* appears to make a shooter who intends to kill only his primary target liable as an attempted murderer of anyone injured or even threatened by a stray shot, whereas, under California law, those facts show only implied malice as to the person hit or threatened, which does not support a conviction of attempted murder. (See *People v. Perez, supra,* 50 Cal.4th at 232.) Unless the definition of attempted murder in California is to be greatly expanded, the loose notion of a kill zone used in *Harvey* and the lower court here should be rejected.

For these reasons, the five shots Windfield fired at a target 100 or more feet away do not support the inference that Windfield was trying to kill the target and everyone around him. The kill zone instruction was error, because it was supported by insufficient evidence. (*People v. Alexander* (2010) 49 Cal.4th 846, 920–921.)

II. THE INSTRUCTION IS ERROR, BECAUSE IT SUGGESTS THAT THE JURY MAY FIND THAT WINDFIELD INTENDED TO KILL EVERYONE AROUND DENZELL PRIDE WITHOUT FINDING GOOD REASON TO PREFER THAT INTERPRETATION OF THE EVIDENCE OVER THE SIMPLER INTERPRETATION THAT WINDFIELD SHOT AT PRIDE BUT FAILED TO HIT HIM.

In his opening brief, Windfield argued that the kill zone instruction was error, because it allowed the jury to convict him of attempted murder of Bolden without making a sufficient finding he intended to kill Bolden. (WBOM 23-31.) In the answer brief, respondent argues that the instruction does not permit the jury to convict Windfield of attempted murder of Bolden without finding either that he intended to kill Bolden specifically or intended to kill everyone in the kill zone. (AB 23-37.) Windfield agrees that the instruction purports to require the jury to find intent to kill Bolden, but Windfield maintains that the instruction invites the jury to speculate and use flawed analysis that does not satisfy the requirements of due process.

One problem is that the instruction does not require the jury, if it relies on the kill zone theory, to find that Bolden was in the kill zone. Respondent denies that this is so, but respondent is wrong. Respondent argues that the jury could not convict Windfield of attempted murder of Bolden without finding that Bolden was in the kill zone, because, despite anything said in the kill zone paragraph, the jury would return to the opening language of the instruction that requires the jury to find that "the defendant intended to kill [Bolden]" (1 CT 232). (AB 25.) But, as applicable to a conviction on the kill zone theory, the kill zone paragraph states "In order to convict the defendant of the attempted murder of Trayvon Bolden, the People must prove that the defendant ... intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant ... intended to kill Denzell Pride by killing everyone in the

kill zone, then you must find the defendant not guilty of the attempted murder [of Bolden]." (1 CT 233.) The kill zone paragraph purports to define what the prosecutor must prove to obtain a conviction on the kill zone theory, and the definition is incomplete, because it does not include Bolden's presence in the kill zone. Wingfield's rights should not depend on the jury's second-guessing what the instruction means or filling in omissions on its own. Respondent says, "Of course, the person in this theoretical kill zone was Bolden" (AB 25), and respondent embellishes a quote of language in the instruction as "the People must prove that the defendant ... intended to kill everyone [i.e., Bolden] within the kill zone" (AB 26, bracketed phrase added by respondent), but respondent is simply supplying what the instruction lacks. Respondent also states that the instruction "already says" that "if the appellants, in order to kill Pride, created a kill zone, *and Bolden was in that zone*, the jury could infer they specifically intended to kill Bolden." (AB 31, italics added.) Of course, the italicized language is just what the instruction *does not* say.

A more serious problem is that the instruction offers the jury two alternative views of the evidence but provides no guidance in choosing between them. The alternatives are: (1) Windfield intended to kill Denzell Pride but his shots all missed Pride and (2) Windfield intended to kill Pride by killing everyone around Pride, including Bolden. Windfield submits that the first alternative is the natural, commonsense interpretation of the evidence, and the second alternative is a needlessly complicated interpretation that should be excised with Occam's razor unless there is good reason to prefer it. In *Bland* and the situations discussed in *Bland* and *Ford*, the devastating nature and scope of the force used provided good reason. As *Ford* states, it is that quality that supports an inference of intent to kill those around the primary victim and makes those situations distinct from mere implied malice, which does not support a conviction of

attempted murder. (*Ford* at 717, cited in *Bland* at 330.) The instruction given here does not require the jury to find that the force was devastating before the jury finds that Windfield intended to kill everyone around Pride. Because it does not, it invites jury to speculate about the extent of Windfield's intent. For that reason, the instruction is error.

III. THE KILL ZONE INSTRUCTION SHOULD NOT BE GIVEN, BECAUSE IT MAKES A STATEMENT OF FACT, CONVEYS NO LEGAL INFORMATION, AND SERVES NO PURPOSE EXCEPT TO PROVIDE A FRAMEWORK FOR THE PROSECUTOR'S ARGUMENT.

In his opening brief, Windfield argued that instruction on the kill zone theory should not be given as a matter of policy, because, when the evidence supports it, it is unnecessary, and, otherwise, it provides an apparent legitimacy and analytical framework for arguments that would appear unreasonable without it. (WBOM 32.)

In the answer brief, respondent justifies the instruction as "a correct statement of the law." (AB 23, 26.) Respondent is wrong. The kill zone paragraph of CALCRIM No. 600 is not a correct statement of law, because it is not a statement of law. There is no legal information in the kill zone paragraph. The paragraph provides an incomplete summary of the kill zone theory, which, as the Court observed in *Bland*, "is not a legal doctrine." (*Bland* at 331, fn. 6.) Rather, the kill zone theory "is simply a reasonable inference the jury may draw in a given case." (*Ibid.*) This Court has stated several times that jury instruction on the kill zone theory is not required. (*People v. Stone* (2009) 46 Cal.4th 131, 137–138; *People v. Smith* (2005) 37 Cal.4th 733, 746; *Bland* at 331, fn. 6.)

Instead of being a statement of law, the kill zone paragraph of CALCRIM No. 600 is a statement of fact. It tells the jury that a certain

state of affairs may exist, namely, that "a person may intend to kill one specific victim and at the same time intend to kill everyone in a particular zone." (1 CT 233.) As a statement of fact, the instruction is error under Penal Code section 1127, which states that the court should instruct "on law applicable to the facts of the case" and instruct "on the law, but not with respect to matters of fact."

The error is not cured by the admonitions that "some of these instructions may not apply, depending on your findings about the facts the case" and that the jury should not assume that giving an instruction is "suggesting anything about the facts" (CALCRIM No. 200, 1 CT 211). A statement of fact, such as that a person may intend to kill one specific victim and at the same time intend to kill everyone in a particular zone, is just that; it neither applies nor does not apply. And the statement of fact simply contradicts the assertion that the instructions are not "suggesting anything about the facts."

The statement of fact is further objectionable because it describes a situation that is unusual but, if it exists, helpful to the prosecution and harmful to the defendant. The term "kill zone theory" did not enter California jurisprudence until *Bland* was decided in 2002, and, although *Bland* stated that there were California cases that could be considered "kill zone" cases even though they do not employ that term, it cited only two, *Vang* and *Gaither* (*Bland* at 330). As of December 2, 2015, a Westlaw search of California decisions, published and unpublished, that include the term "kill zone" yields 333 cases, but a Westlaw search of California decisions, published and unpublished, that include the term "attempted murder" yields 7,069 cases. All of this suggests that situations in which a defendant intends to kill a primary target by killing everyone around the primary target are uncommon. It is prejudicial to the defendant for the court to tell the jury that such an uncommon situation may exist, and

especially so without making a balancing statement such as, "A person may intend to kill a specific victim using means that endanger other persons whom he does not intend to kill."

Respondent also justifies the kill zone paragraph of CALCRIM No. 600 as a proper instruction on a permissive inference. (AB 35-36.) This is also incorrect. The kill zone paragraph is not in form an instruction on a permissive inference. In a permissive inference, the jury finds a basic fact and, from that, infers an elemental fact. (*County Court of Ulster County, N. Y. v. Allen* (1979) 442 U.S. 140, 157.) For example, the jury may find that the defendant was in possession of stolen property and, from that and other slight corroborating evidence, infer that the defendant was the thief. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1350; CALJIC No. 2.15.) Or, the jury may find that the defendant failed to explain or deny evidence of facts against him that he could reasonably be expected to explain or deny because of facts within his knowledge and, from that, infer the truth of the adverse evidence. (Evid. Code, § 413; *People v. Saddler* (1979) 24 Cal.3d 671, 680-681.) Or, the jury may find that the defendant fled the scene of the crime and consider that with other evidence in deciding whether the defendant is guilty. (CALJIC No. 2.52.) The kill zone paragraph of CALCRIM No. 600 does not establish any such progression from a basic fact to an elemental fact. It simply states that a person may intend to kill a primary victim by killing everyone in an area inhabited by the primary victim, which is an elemental fact, without mentioning any basic fact from which the elemental fact might be inferred.

Respondent argues that the basic fact is the defendant's creation of a kill zone, and the elemental fact is the intention to kill everyone in the kill zone (AB 36), but that is not correct. If the defendant intended to create a kill zone, it follows as a matter of definition and logic that he intended to kill everyone in the zone and, hence, intended to kill anyone who happened

to be in the zone. In a true permissive inference, as the above examples show, the relation between the basic fact and the elemental fact is experiential, not tautological. There is "a 'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former" (*County Court of Ulster County, N. Y. v. Allen*, *supra*, 442 U.S. at 165), but the jury is not required to draw the inference (*People v. Parson* (2008) 44 Cal.4th 332, 355). In contrast, it would be irrational to say that the defendant intended to create a kill zone but did not intend to kill someone who happened to be within it. Therefore, the kill zone instruction is not a permissive inference.

The kill zone instruction simply provides a framework for the prosecutor's argument. The bench notes to CALCRIM No. 600 state that the kill zone paragraph "is provided for cases in which the prosecution theory is that the defendant created a 'kill zone,' harboring the specific and concurrent intent to kill others in the zone. (Citation.)" The purpose of instructions is not to support the prosecutor's factual arguments, however, but to inform the jury about the general principles of law relevant to the issues raised by the evidence. (Pen. Code, § 1093, subd. (f); *People v. Booker* (2011) 51 Cal.4th 141, 179.) The prosecutor's argument may sometimes require instruction, as, for example, if the prosecutor argues that the defendant is liable on a theory of aiding and abetting. (*People v. Delgado* (2013) 56 Cal.4th 480, 488.) But the kill zone theory is not a legal doctrine, it is just a reasonable factual inference in a given case. (*Bland* at 331, fn. 6.) The court should not instruct the jury that a defendant may intend to kill a primary target by killing everyone around the primary target, just as it should not instruct the jury that, for example, a defendant may intend to kill a victim because of gang issues between the defendant and the victim. The prosecutor is free to make those arguments to the jury, but the court should not instruct on them. For the court to instruct the jury

that a defendant may intend to kill a primary target by killing everyone around the primary target unavoidably lends the court's imprimatur to the prosecutor's argument that such are the facts in the case before the jury.

Here, the court instructed the jury before counsel argued. (RT 789-842.) With the benefit of the instruction, when the prosecutor began to argue her kill zone theory, she was able to begin, "There's also this concept of kill zone within attempt." (4 RT 864-865.) The prosecutor made the kill zone theory sound as if it were a legal doctrine, saying, "If they're shooting at someone and people are within the zone that they can get killed, then you're responsible for attempted murder as to the people who are within the zone of fire." (4 RT 865.) The prosecutor's argument was misleading, because people can be within a zone in which they might be harmed and yet the zone may not be a kill zone, because the force used is insufficient. It is reasonable to think that, if the court had not given the kill zone instruction, the prosecutor could not plausibly have made a kill zone argument.

For these reasons, regardless of the state of the evidence, the kill zone instruction should not have been given.

IV. THE INSTRUCTION WAS PREJUDICIAL AS TO COUNT 2.

In his opening brief, Windfield demonstrated that he was prejudiced by the kill zone instruction, because there is a reasonable probability that the jury rejected the finding that Windfield intended to kill Bolden specifically and instead relied solely on the kill zone theory. (WBOM 33-36.) Windfield stands on that argument.

Respondent argues that the jury's finding that the attempted murder of Bolden was willful, deliberate, and premeditated demonstrates that Windfield specifically intended to kill Bolden. (AB 38.) But this does not

show that the jury did not rely on the kill zone theory, because the creation of a kill zone could have been willful, deliberate, and premeditated.

Respondent states that Windfield claims that there was "no evidence to support a determination appellants intended to kill Bolden." (AB 38.) Not so. Windfield conceded in his opening brief in the Court of Appeal that there was sufficient evidence that he intended to kill Bolden specifically. (WAOB 18.) But, in this Court and in the Court of Appeal, Windfield's argument is that the evidence was such that the jury could have found that he did not intend to kill Bolden specifically and instead relied on the kill zone theory. (WAOB 19-20; WBOM 34-35.)

Thus, the kill zone instruction prejudiced Windfield as to Count 2.

CONCLUSION

For the reasons stated above, Windfield's conviction of attempted murder of Bolden in Count 2 should be reversed.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.360 of California Rules of Court, counsel on appeal certifies that, according to the word count function of the word processing software with which this brief was produced, this brief contains 5,251 words.

David P. Lampkin

_____

DAVID P. LAMPKIN

PROOF OF SERVICE BY MAIL

Re: KeAndre Windfield, Court Of Appeal Case: E054056, Superior Court Case: FVA1001265

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On December 4, 2015, I served a copy of the attached Reply Brief on the Merits (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

Court of Appeal, 4th District, Division 2
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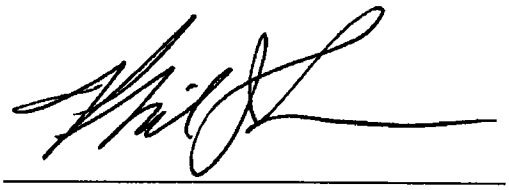
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 4th day of December, 2015.

Phil Lane
(Name of Declarant)


(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: KeAndre Windfield, Court Of Appeal Case: E054056, Superior Court Case: FVA1001265

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On December 4, 2015 a PDF version of the Reply Brief on the Merits (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated and/or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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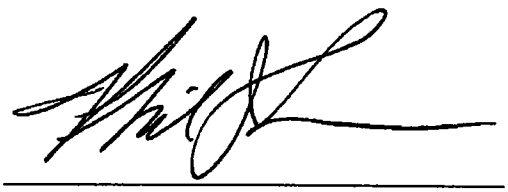
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 4th day of December, 2015 at 14:29 Pacific Time hour.

Phil Lane
(Name of Declarant)



(Signature of Declarant)