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SUPREME COURT
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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 ANSWER TO AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

California Cases

California Statutes

Other Authorities

S221958

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APPELLANT WINDFIELD'S ANSWER TO AMICUS CURIAE BRIEF

ARGUMENT

Appellant Windfield answers the brief of amicus curiae as follows:[1]

A. Attempted murder requires intent to kill.

Amicus argues that attempted murder requires intent to kill. (ACB 8-11.) Windfield agrees. Windfield's argument in his briefs relies on that principle. (WBOM 8-11, 18-21; WRB 2-11.)

B. A kill zone does not require a primary target.

Amicus argues that a kill zone does not require a primary target. (ACB 12-24.) Windfield agrees (see WRB 5, fn. 1), but Windfield does not contend that the error in the instruction given here is the reference to a primary target.

C. No instruction on the kill zone theory should be given.

The issue on which review was granted is, "Was the jury properly instructed on the kill zone theory of attempted murder?" In his briefs, Windfield argues that the instruction given here was erroneous, because, among other things, it makes a statement of fact – "A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone' " (CALCRIM No. 600, 1 CT 233) – in disregard of the statutory admonition that the court should instruct "on law applicable to the facts of the case" and should not instruct "with respect to matters of fact" (Pen. Code, § 1127). (WRB 11-12.) The error

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[1] In this Windfield's Answer to Amicus Curiae Brief, "WBOM" means Windfield's Opening Brief on the Merits, "WRB" means Windfield's Reply Brief, and "ACB" means the Amicus Curiae Brief filed by attorney Mitchell Keiter.

of instructing on a matter of fact is exacerbated by singling out an uncommon fact – the creation of a kill zone – that increases the defendant's criminal liability. (WRB 12-13.)

Amicus does not comment on the instruction given here. Rather, amicus argues that, as a general matter, trial courts should instruct on the kill zone, because "[k]ill zone instructions clarify a confusing area of the law." (ACB 25.) Windfield disagrees.

As a preliminary matter, the validity of amicus's argument depends on the particular kill zone instruction given. Even if some instruction might be of assistance to the jury, the one given here, with its improper assertion of a fact, logical errors, and strange locutions, provided no clarification and prejudiced Windfield. (See WBOM 25-27; WRB 11-15.)

More generally, Windfield disagrees with amicus that the kill zone theory is "a confusing area of the law" (ACB 25). As this Court observed in *Bland*, the kill zone theory "is not a legal doctrine." (*People v. Bland* (2002) 28 Cal.4th 313, 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. (*Ibid*; *People v. Smith* (2005) 37 Cal.4th 733, 746; *People v. Stone* (2009) 46 Cal.4th 131, 137–138.)

Using kill zone theory, the jury has only two questions to answer. First, does the nature and scope of the force used by the defendant support the reasonable inference that the defendant intended to kill everyone within some zone? Second, if so, was the alleged victim within that zone when the defendant acted? (*People v. Bland, supra,* 28 Cal.4th at 330; *People v. Vang* (2001) 87 Cal.App.4th 554, 563-564; *People v. Adams* (2008) 169 Cal.App.4th 1009, 1023 ["(1) Adams had the express intent to kill Soult by intentionally creating a zone of harm or kill zone ... and (2) Lopes, J.V., and Marr were within that zone of harm," therefore, Adams had the

necessary express malice for attempted murder of Lopes, J.V., and Marr]; *People v. Smith, supra,* 37 Cal.4th at 755–756 (Werdegar, J., dissenting) ["A kill zone ... analysis ... focuses on (1) whether the fact finder can rationally infer ... that the defendant intentionally created a zone of fatal harm, and (2) whether the nontargeted alleged attempted murder victim inhabited that zone of harm. (Citation.)"].)

The first question, whether the nature and scope of the force used by the defendant supports a reasonable inference that the defendant intended to kill everyone in some zone, may not always be easy to answer. Depending on the evidence, the conclusion that the inference is reasonable may be "compelled," as it was in *Bland* (*People v. Bland, supra,* 28 Cal.4th at 330) and it surely would be in the bomb-on-an-airplane case. Or it may be unsupportable, as it was in *Stone* and *Perez* (*People v. Stone, supra,* 46 Cal.4th at 232; *People v. Perez* (2010) 50 Cal.4th 222, 232). Or, like many questions of fact, it may be a matter on which reasonable minds may differ. Windfield does not see how an instruction can help the jury decide the scope of the defendant's intent. Nor, if the jury finds the defendant did intend to kill everyone within an area, will an instruction help the jury decide whether an alleged victim was within the area.

If the jury concludes based on substantial evidence that the defendant did intend to kill everyone in some zone, the jury should not require instruction to find that the defendant intended to kill a person who was within the zone but was not killed. It is a matter of simple logic, on a par with "All cows are brown; Elsie is a cow; therefore, Elsie is brown."

Since instruction will not help the jury decide whether the defendant intended to kill everyone within a particular zone or whether a particular person was within that zone, and since, if these things are established, the conclusion that the defendant intended to kill that person is a simple logical deduction, instruction on the kill zone theory is unnecessary and should not

be given.

Amicus states that "Windfield contends no [kill zone] instruction is necessary because rule is so intuitive." (ACB 25.) Windfield takes exception to amicus's characterization of his argument. Windfield does not argue that kill zone reasoning is "intuitive." "Intuitive" means "perceived by intuition," and "intuition" means "direct perception of truth, fact, etc. independent of any reasoning process." (Webster's Universal College Dictionary (1997), p. 431.) Windfield does not argue that the presence of a kill zone can be discerned "independent of any reasoning process." To the contrary, Windfield argues, and Windfield reads *Bland* to state, that in a proper case the defendant's use of force may be such that it is reasonable to infer that defendant intended to kill everyone in some zone defined by the use of force and the circumstances. (See WBOM 9-12; *People v. Bland, supra,* 28 Cal.4th at 329-330.) If the inference may reasonably be made, and a person was within the zone but was not killed, then it is proper to conclude that the person is a victim of attempted murder. The conclusion is the product of a reasonable inference of fact and application of the rule that attempted murder requires intent to kill. Such reasoning is the antithesis of intuition. But whether the jury should engage in such reasoning in a given case should be the subject of argument and persuasion by counsel, not instruction by the court.

Amicus asserts that trial courts should instruct on the kill zone theory, because "the concept has confounded appellate justices" (ACB 25) and "even appellate courts have difficulty understanding it" (ACB 6). But, if appellate courts have trouble with the kill zone theory, the solution is, not a jury instruction, but guidance from this Court in an opinion.

CONCLUSION

For the reasons stated above, attempted murder requires intent to kill, a kill zone may exist without a primary target, and instruction on the kill zone theory should not be given.

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 1,548 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 April 27, 2016, I served a copy of the attached Answer to Amicus Curiae Brief 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:

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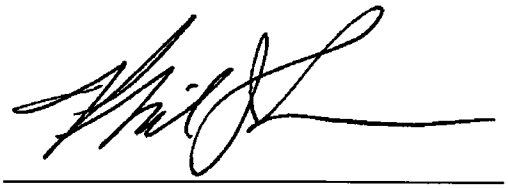
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 27th day of April, 2016.

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 April 27, 2016 a PDF version of the Answer to Amicus Curiae Brief 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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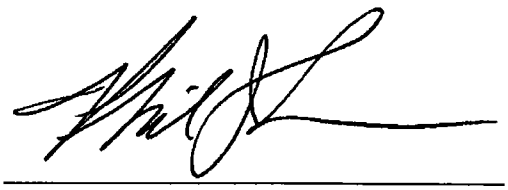
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 27th day of April, 2016 at 14:50 Pacific Time hour.



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