S271049

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court Case No. _____

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent **v.** **AHMED MUMIN,** Defendant and Appellant.	Court of Appeal Fourth District Division One Case No. D076916 San Diego County Superior Court Case Number SCD261780

APPEAL FROM THE SAN DIEGO COUNTY SUPERIOR COURT

The Honorable Kenneth K. So, Judge

PETITION FOR REVIEW (Cal. Rules of Court, rule 8.500) AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE, AFFIRMING AND MODIFYING THE JUDGMENT

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TO THE HONORABLE CHIEF JUSTICE TANI GORRE CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Ahmed Mumin respectfully petitions for review from the published decision of the Court of Appeal, Fourth Appellate District, Division One, issued August 19, 2021.[1]

ISSUE PRESENTED

Does the Court of Appeal's decision affirming Mumin's attempted murder convictions based on the prosecution's "kill zone" theory of liability directly contravene this Court's decision in *People v. Canizales* (2019) 7 Cal.5th 519 and create an untenable conflict among the lower courts of appeal concerning the proper standards of review in resolving challenges to attempted murder convictions based on this theory of liability?

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[1] Neither party petitioned for a rehearing.

NECESSITY FOR REVIEW

Review is necessary in this case because the answer to the question above is a resounding yes. This Court's seminal *Canizales* case concerning the proper use of the "kill zone" theory of attempted murder liability purposefully established exacting standards of scrutiny both at the trial and appellate levels, which were carefully designed to *rein in* the "troubling," "substantial potential" for abuse and misapplication of the kill zone theory in securing attempted murder convictions. (*Canizales*, *supra*, 7 Cal.5th at pp. 607-608.) The Court even admonished that "*relatively few* cases" will ever exist where "the theory will be applicable" under these standards. (*Id.* at pp. 597, 608.)

It is also clear under *Canizales* that challenges to an attempted murder conviction on the basis that the trial court improperly instructed the jury on a kill zone theory of liability are to be reviewed as claims of *instructional error* subject to reversal under the standards this Court has established for assessing the prejudicial impact of such errors. The principles underlying the analytical framework of *Canizales* are worlds apart from those that courts apply in reviewing a record through

the highly deferential "sufficiency-of-the-evidence" lens to merely determine whether "sufficient" evidence supports the outcome.

Yet, in a published opinion that affirms two convictions of attempted murder against Mumin based directly on a "kill zone" theory of liability, the Court of Appeal did just that: it reduced *Canizales's* exacting standards of scrutiny to a highly deferential review that merely tests for the existence of sufficient "substantial evidence" and requires the affirmance of an attempted murder conviction under a kill zone theory of liability so long as "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found" the defendant acted with the requisite intent regardless of whether "the circumstances might also reasonably be reconciled with a contrary finding." (App. A at pp. 12-13.) Thus, the Court of Appeal's analysis entirely avoids the governing standards in the proper assessment of instructional errors and the resulting prejudicial impact of such errors. And that's particularly problematic here, where the instruction authorizing the jury to convict Mumin based on the prosecution's kill zone theory was materially misleading with improper, incomplete, and vague descriptions of both the law and the particular theory of guilt.

This Court's intervention is necessary to rectify the resulting miscarriage of justice in this case and to avert similar miscarriages of justice in future cases involving attempted murder charges prosecuted on "kill zone" theories of liability. Until then, the Court of Appeal's outlier opinion will remain binding precedent on all superior courts under its jurisdiction and will perpetuate an untenable conflict in the law among the lower appellate courts, the rest of which have followed *Canizales*.

STATEMENT OF THE CASE AND FACTS

Mumin was convicted of a series of crimes for having allegedly shot and killed a customer during a burglary and robbery of a convenience store in San Diego City and then allegedly attempting to kill two police officers a couple days later at a nearby apartment complex by firing three gunshots from inside a unit where he was hiding while police were searching for him: special-circumstance murder (§§ 187, subd. (a),[2] 190.2, subd. (a)(17)), burglary (§ 459), and robbery (§ 211), with associated firearm use enhancements (§§ 12022.5, subd. (a), 12022.53,

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[2] All statutory citations are to the Penal Code.

subds. (b), (c), & (d)), and unlawful firearm possession (§ 30305, subd. (a)(1)) in the first incident; and two counts of willful, deliberate, and premeditated attempted murder of a peace officer (§§ 664, subd. (e)(1) / 187, subd. (a), 189), two counts of assault with a handgun on a peace officer (§ 245, subd. (d)(2)), and two counts of handgun assault (§ 245, subd. (b)), with associated firearm use enhancements (§§ 12022.5, subd. (a), 12022.53, subds. (b) & (c)), and unlawful firearm possession (§ 30305, subd. (a)(1)) in the second incident. (3CT 580-581, 585-600.)

On appeal, Mumin principally contended that the trial court prejudicially erred in instructing the jury under a legally invalid "kill zone" theory of attempted murder liability, compelling reversal of his attempted murder convictions. He further contended that his convictions of assault with a semiautomatic firearm must be vacated as lesser, necessarily included offenses of the convictions of assault on a peace officer with a semiautomatic firearm. Lastly, Mumin asserted that the trial court's questioning of defense counsel about the "approach" to the closing argument in the presence of the jurors violated his

right to counsel.[3] The Court of Appeal did modify the judgment to vacate the two assault convictions of concern, but it rejected the other contentions as being "without merit." (App. A at 2.)

Mumin petitions for review of his claim concerning the application of the "kill zone" theory of attempted murder liability in this case, which cannot be reconciled with this Court's opinion in *Canizales*, *supra*, 7 Cal.5th 5 and directly conflicts with the published authority of other California Courts of Appeal.

The following is a summary of the evidence developed at trial, with additional detail provided in the Argument section:

Through eyewitness, DNA, and other forensic evidence, Mumin was implicated as the perpetrator in an armed robbery that led to the shooting death of a customer at an AM/PM convenience store in San Diego City on the morning of April 16, 2015. (10RT 2013-2019, 2023-2024, 2031-2035, 2040-2041, 2044-2045, 2048, 2052-2057, 2060-2063, 2080, 2100-2101, 2151-2158; 11RT 2329-2339; 13RT 2939-2940.) The perpetrator had fled the crime scene towards a nearby apartment complex on Winona

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[3] Mumin presents his claim concerning the trial court's questioning of defense counsel solely for purposes of exhausting his state appellate remedies. (See Cal. Rules of Court, rule 8.508.)

Avenue with a small amount of cash from the cash register. (10RT 2019-2020, 2033-2034, 2041-2043, 2048-2050.)

Late on the night of April 17th, investigators with the San Diego Police Department received intel that Mumin was possibly hiding out somewhere within the apartment complex, so several police officers from various units of the San Diego Police Department (about ten total) converged on the complex and conducted a search into the early morning hours of April 18th. (11RT 2355-2361, 2366, 2368, 2370, 2375-2376, 2398; 12RT 2768-2770, 2772-2274.) The officers moved through the complex in groups, calling out residents and searching various apartments while they looked for Mumin over a period of about an hour. (11RT 2376-2378, 2392-2393, 2398, 2410, 2414, 2426-2427, 2451-2454, 2458, 2460, 2477, 2489, 2493-2494; 12RT 2643-2645, 2658, 2663-2664, 2671-2672, 2758, 2776.) A helicopter unit hovered above for a portion of this time, leaving the scene around 2:00 a.m. (11RT 2390, 2392, 2474-2477; 12RT 2662-2663, 2672.)

As law enforcement was converging on the complex, Mumin first pleaded unsuccessfully with a resident (a relative of his) to give him a ride "somewhere out of [t]here" so he could avoid the police. (13RT 2906-2918, 2926-2927, 2931-2932.) Stuck inside the

complex, Mumin encountered one of the officers, and he ran away seemingly "startled" or "scared." (11RT 2404-2407, 2425-2426.) He was in possession of a handgun and a backpack containing some ammunition. (11RT 2367-2371, 2407-2408, 2411-2412, 2417, 2444-2446, 2454, 2484, 2490; 12RT 2757, 2679-2682; 2CT 319-320, 323-324.) Mumin then tried to enter some of the units in one of the apartment buildings through the doors and windows. (11RT 2367-2369, 2414, 2428-2429, 2431-2434, 2436, 2484, 2490; 12RT 2757, 2776; 2CT 318-329.) He eventually gained access to a community center room, which residents used to conduct Islamic activities, in the lower level of another building nearby. (11RT 2435-2438, 2415, 2417, 2420, 2455; 12RT 2648, 2682-2683, 2777.)

The front wall of the community room that Mumin entered had no windows, and it was accessed by a series of four relatively narrow doors situated closely together—Doors 1 through 4, from right to left, as they were described at trial. (11RT 2381, 2495; 12RT 2614-2615, 2626-2627, 2724-2726, 2754; 15RT 3524-3525.) Among the law enforcement officers on the scene were Detectives James Mackay, Luke Johnson, and Marc Pitucci. Around 2:42 a.m., Detective Mackay approached the series of doors in the front wall of this building, while Detective Johnson stood to the

left of Mackay, about 25 feet back, and Detective Pitucci stood back about 30 feet. (11RT 2383, 2389-2390; 12RT 2684-2685, 2779, 2788, 2791.) All the doors were closed. (11RT 2494.)

Mackay approached Door 1 and began to open it by turning the handle. (11RT 2495-2497, 2500-2501; 12RT 2615-2617.) He did not knock or make any announcements first. (12RT 2612, 2624, 2627.) As soon as he moved the handle, gunfire erupted from within the room in a rapid succession of three bullets (11RT 2383-2384, 2394, 2497-2498; 12RT 2616, 2619-2620, 2624, 2780-2782). Two of the bullets struck and exited through Door 2. (13RT 2988-2992, 2997-2998, 3012.) The exit trajectory of the third bullet was unknown, although investigators "assumed" that one of the doors (without specifying which) was probably slightly ajar during the incident and thus the bullet must have traveled through this space and struck a dumpster enclosure in an outside parking lot where a mark consistent with a bullet strike mark was observed. (12RT 2703-2707; 13RT 2992-2996, 3009-3014.)[4]

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[4] Mackay and Pitucci testified that they believed Door 1 may have been slightly ajar after Mackay had first turned its handle (11RT 2499; 11RT 2383-2384, 2394), but Johnson recalled that this door had remained closed throughout the incident (12RT

Mackay spun around, tripped, and fell to the ground as the shots rang out. (11RT 2384-2386, 2497, 2501-2502; 12RT 2617.) Neither he nor either of the other detectives was struck by the gunfire. (11RT 2504; 12RT 2620-2621, 2784.) Mackay reapproached the front wall of the building and shot three rounds of return fire into the room. (11RT 2386, 2497-2498, 2502-2503; 12RT 2617-2619.) Johnson approached the same area and shot five rounds of return fire himself. (11RT 2386-2387; 12RT 2781-2784, 2788, 2791; 13RT 3001-3005.) All the return gunfire struck and went through Door 2. (13RT 2985-2988, 3011-3012.)

Mumin was struck by this gunfire into the room. (11RT 2389, 2504; 12RT 2766, 2784-2785.) He eventually emerged from the room unarmed and surrendered to law enforcement without further incident. (11RT 2388, 2458; 12RT 2763, 2766.)

A loaded 9-millimeter handgun was inside the room along with three expended cartridges and some additional ammunition. (12RT 2708-2723, 2748-2749, 2764.) Ballistics testing indicated that these cartridges and the cartridge recovered from the

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2789). There is no indication in the evidence that Door 2 or any of the other doors was open at any point during the incident.

shooting at the AM/PM were expended bullets fired from this gun. (12RT 2708-2709, 2720-2723; 13RT 2954-2959.)

ARGUMENT

I. Review is Necessary to Ensure that Lower Courts Consistently and Properly Apply the Important Limitations that This Court Established in *Canizales* to Protect Against the "Troubling" Potential for Misuse of the "Kill Zone" Theory in Attempted Murder Cases

The Court of Appeal's opinion presents itself as following the letter of the law in *Canizales* to conclude that appellate courts should default to "familiar principles of substantial evidence review"—complete with all the highly deferential trappings of a review for "sufficiency of the evidence"—in resolving claims that a trial court improperly instructed the jury on a kill zone theory of liability for attempted murder. (App. A at p. 9.) Yet, the opinion overlooks the very foundation on which the *Canizales* analysis rests, which makes no mention of any such principles because the framework is built around the standards that reviewing courts employ to resolve claims of *instructional error*, and specifically claims that a trial court committed reversible error in instructing on a legally and/or factually inadequate theory of liability.

This is precisely how Mumin framed his claim on appeal challenging his attempted murder convictions. He illustrated that the issue on appeal was preserved because his trial counsel had objected to the kill zone theory instruction on the basis that this theory of attempted murder liability was inapplicable (AOB 43), and he argued throughout his briefing that the trial court had prejudicially erred in authorizing the jury to convict him of attempted murder under this legally invalid theory (see e.g., AOB 39, Argument I heading ["The Trial Court's Instructions to the Jury Endorsing the Prosecution's Legally Invalid 'Kill Zone' Theory of Liability Compel Reversal of Both Attempted Murder Convictions"]; ARB 20 ["Because it cannot be said that the *only* reasonable inference is Mumin intended to create such a zone of harm, as the cardinal rule of *Canizales* requires (*Canizales*, *supra*, 7 Cal.5th at p. 597), it was improper to instruct the jury under this theory of liability"]; Supplemental Brief ("SB") 3, italics original ["In *this* context, concerning an instructional charge permitting the jury to convict the defendant of attempted murder under a 'kill zone' theory, the question is one of instructional error."].)

Notably too, the Attorney General himself framed the issue in exactly the same manner in his respondent's brief, analyzing it

as purely a question of instructional error with no reliance upon "sufficiency-of-the-evidence" standards in seeking affirmance. (See e.g., RB 27, Argument I heading: "The Trial Court Properly Instructed the Jury on the 'Kill Zone' Theory of Liability for the Charged Attempted Murders and Any Error Was Harmless on the Facts of This Case"]; RB 50 ["there was no reasonable likelihood that the jury understood the kill zone instruction in a legally impermissible manner"]; *ibid.* ["Even under the more stringent test under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), however, the alleged error was harmless beyond a reasonable doubt. (*People v. Aledamat* (2019) 8 Cal.5th 1, 13."].)

The Attorney General made no attempt to rely on the overly deferential standards of review for sufficiency-of-the-evidence claims until after the Court of Appeal extended the opportunity to take advantage of these standards through its request for supplemental briefing that suggested they presented another path to affirm the judgment. (See Court of Appeal order, dated July 9, 2021, requesting the parties to brief the following question: "Does *Canizales* direct a departure, in whole or in part, from traditional principles of substantial evidence review when the prosecution relies primarily on circumstantial evidence (see, e.g., *People v.*

Ghobrial (2018) 5 Cal.5th 250, 278)?"]; Resp. SB 2 [arguing for the first time that the traditional sufficiency-of-the-evidence principles, like those articulated in the *Ghobrial* case, should be applied in resolving the issue on appeal because the *Canizales* analysis "makes plain that the court was reviewing for substantial evidence and nothing in the court's analysis suggests there is a heightened requirement or departure from that standard"].)

No such path to affirmance exists in these cases, which must be analyzed under the instructional error framework this Court clearly established in *Canizales*. The Court of Appeal's opinion cannot be reconciled with *Canizales*, it effects a miscarriage of justice in this case, it significantly erodes the important protections established in *Canizales* to preserve fundamental fairness, and it sets up a direct conflict among the lower courts.

The Court of Appeal's opinion cannot be left to stand.

A. *Canizales* Makes Clear that These Challenges Must be Analyzed as Instructional Errors Subject to Reversal Based on the Extent of Their Prejudicial Impact

What the *Canizales* Court explained in establishing the procedural and substantive protections it did is that trial courts are to act as gatekeepers exercising "extreme[] care[] in

determining when to permit the jury to rely upon the kill zone theory" (*Canizales*, *supra*, 5 Cal.5th at p. 597) and are to *only* do so "where substantial evidence exists to support a finding *that the only reasonable inference* is that a zone of fatal harm has been created" (*id.* at pp. 611-612, italics added). That is, only "where *the court* concludes there is sufficient evidence to support a jury determination that *the only reasonable inference* from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm" is it proper to instruct the jury on such a theory of liability. (*Id.* at p. 608, italics added.)

In performing this uniquely important gatekeeping function, it is not enough for the trial court to simply provide and assume the jury will follow the general instruction on the use of circumstantial evidence to prove the prosecution's theory of the case—that the jury must adopt the inference pointing to innocence when circumstantial evidence points to guilt or innocence—because "*even when* a jury is otherwise instructed on circumstantial evidence and reasonable doubt, the potential for misapplication of the kill zone theory remains troubling." (*Canizales*, *supra*, 7 Cal.5th at 607, italics added.) Rather, the court must both ensure for itself that *the only reasonable inference*

is the defendant acted with the requisite intent *and* expressly advise the jury that it may convict on this theory of attempted murder only if the jury can find *the only reasonable inference* is the defendant intended to create a zone of fatal harm. (*Id.* at p. 608.)

As would naturally follow from such an analytical framework, resolving whether a trial court failed to properly apply it presents a question of *instructional error* on appeal, subject to reversal if the impact of the asserted error cannot be set aside as "harmless." That is precisely how this Court analyzed the issue in *Canizales*. Indeed, neither the parties nor the Court spend any time in that case suggesting the matter should or could be resolved under principles of "substantial evidence" review that apply in resolving sufficiency-of-the-evidence claims. Rather, the only point of dispute regarding how the impact of the kill zone instruction should be resolved there was whether the *Watson* or *Chapman* standard should apply in assessing the possible harmlessness of the instruction's impact. (*Canizales*, *supra*, 7 Cal.5th at pp. 612-613.) And the answer to that question turned on whether the asserted instructional error involved the presentation of a "factually inadequate" theory, i.e., one "not factually supported by the evidence adduced at trial," or a "legally inadequate" theory,

i.e., "a theory of conviction … contrary to law." (*Ibid.*) The Court found that the improper instruction on the kill zone theory involved more than just a factual inadequacy and thus must be treated as a legal inadequacy subject to greater scrutiny. (*Ibid.*)

The *Canizales* Court accordingly tested the error under the *Chapman* standard, which compels reversal unless "'it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error.'" (*Canizales*, *supra*, 7 Cal.5th at p. 615, quoting *People v. Merritt* (2017) 2 Cal.5th 819, 831.) The Court went on to reverse the attempted murder conviction *despite* the existence of evidence indicating "the jury *could* have concluded that defendants had the requisite intent to kill [the non-target victim]," because "other evidence" led the court to conclude "it is not clear beyond a reasonable doubt that a reasonable jury would have come to that determination" absent the erroneous instruction. (*Id.* at p. 616, italics original.)

Had the Court entertained the sort of sufficiency-of-the-evidence analytical framework that the Court of Appeal posits as an appropriate framework for resolving such claims, both the analysis and results would have been markedly different. But it is clear that attempted murder convictions based on a kill zone

theory are entitled to no such heavy deference by default. Were the default standards of review governed by principles that required appellate courts to view all the evidence "in the light most favorable to the judgment below" and "presume in support of the judgment 'the existence of every fact the trier could reasonably deduce from the evidence'" (App. A at p. 12, quoting *People v. Nelson* (2016) 1 Cal.5th 513, 550), that would essentially gut the protections of *Canizales* specifically designed to limit the use of the "troublesome" kill zone theory to cases where *the only reasonable inference* is that the defendant acted with the requisite intent.[5]

Even if there are some cases in which the inadequacy of an improper instruction on a kill zone theory is "factual" in nature,

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[5] There's presumably also a "double jeopardy problem here with any judgment that happens to be reversed under the standards the Court of Appeal applied in this case. Reversals for "trial errors," like improper instructions, generally don't bar a retrial. (See *In re Martinez* (2017) 3 Cal.5th 1216, 1224 ["A reversal of his conviction on that basis [instructional error] does not bar retrial."].) But, it is well-established that reversals based on a finding of insufficient supporting evidence do bar a retrial under principles of "double jeopardy." (See *People v. Goolsby* (2015) 62 Cal.4th 360, 362 ["the Court of Appeal found the evidence insufficient to sustain the conviction, which precludes retrial of that charge"]; *People v. Goolsby* (2016) 244 Cal.App.4th 1220, 1226, fn. 2 ["a reversal based on insufficiency of the evidence bars any further prosecution for the same offense"].)

the analysis is still, fundamentally, one of *instructional error* with the only difference being that the prejudicial effect of the error would be tested under the *Watson* standard instead of the *Chapman* standard. (*Canizales*, *supra*, 7 Cal.5th at pp. 612-613.) As *Canizales* itself illustrates, the lack of factually adequate support for the instruction in the first instance would not result in a paradigm shift to a mere a sufficiency-of-the-evidence review.

Indeed, so far as Mumin can tell, in all the other published post-*Canizales* cases raising challenges to attempted murder convictions on the basis that the trial court improperly instructed the jury on a kill zone theory of liability, besides this one, the lower courts followed the lead of *Canizales* and analyzed the claims as instructional errors and, when they found error, subjected them to review for prejudice under the standards applicable to legally inadequate theories of liability, with no attempt to fall back on a mere "sufficiency" review. (*People v. Mariscal* (2020) 47 Cal.App.5th 129, 139; *People v. Thompkins* (2020) 50 Cal.App.5th 365, 399; *In re Rayford* (2020) 50 Cal.App.5th 754, 781-784; *People v. Booker* (2020) 58 Cal.App.5th 482, 501; *People v. Cardenas* (2020) 53 Cal.App.5th 102, 116; *People v. Cerda* (2020) 45

Cal.App.5th 1, 20-21 rev. granted, Case No. S260915 [6]; *People v. Dominguez* (2021) 66 Cal.App.5th 163, 281 Cal.Rptr.3d 82, 102-103 [where another panel of the same Court of Appeal whose judgment is at issue in this case reversed attempted murder convictions following the Attorney General's concession that the trial court's instruction on the kill zone theory was tantamount to presenting the jury with a "legally inadequate" theory].)[7]

The Court of Appeal's opinion in this case is an outlier in direct conflict with this Court's precedent and the precedent of multiple other Courts of Appeal in this state. Yet, for so long as it

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[6] *Cerda* found the kill zone instruction proper in that case and thus deemed it unnecessary to engage in a prejudice analysis. (*Id.* at p. 21, fn. 21.) Nowhere in the opinion did the court suggest that the analysis was governed by sufficiency-of-the-evidence standards. Rather, it followed the basic framework set forth in *Canizales* which, again, itself places no reliance on any such deferential standards. (*Id.* at pp. 19-20.) Indeed, the court's conclusion that it need not reach the "argument that instructing on the kill zone theory was prejudicial" because it found no error shows it too recognized that these claims are to be analyzed under the standards for resolving *instructional errors*.

[7] In *People v. Winfield* (2021) 59 Cal.App.5th 496, the defendants specifically framed their challenge as a classic "sufficiency" claim, arguing "there was *insufficient evidence to support* a finding of specific intent to kill in connection with the attempted murder count" (*id.* at p. 514, italics added), so the sufficiency-of-the-evidence standards would have fairly applied.

stays on the books as published law, it is binding upon all the superior courts under its jurisdiction presiding over future prosecutions of attempted murder charges, other panels of the Court of Appeal will follow it in future appeals from such prosecutions under principles of *stare decisis*, and it risks influencing other Courts of Appeal to apply watered-down versions of the stringent protections this Court established in *Canizales*.

B. The Dangers of the Sufficiency-of-the-Evidence Standards Invoked by the Court of Appeal Are Starkly Illustrated Through Its Affirmance of the Judgment

Once the Court of Appeal made the paradigm shift from the instructional error standards to the world of "sufficiency" review, it was able to and did affirm the judgment far too easily in the face of *Canizales's* clear directives placing strict limitations on the use of the kill zone theory in attempted murder prosecutions.

All of the court's conclusions were based directly on this overly deferential framework of appellate review, searching only for adequate confirmation that "*any* rational trier of fact could have found" Mumin acted with the requisite intent while looking at everything in the light most favorable to the outcome at trial. Consistent with this judgment-friendly form of review, the Court

of Appeal's opinion even expressly shifted the burden onto Mumin, asserting that "Mumin has not shown the evidence *did not* support his specific intent to kill Mackay as the primary target." (App. A at p. 24, italics added.) Similarly, the opinion reasoned that "other facts" to the contrary "do not make an inference of intent to kill unreasonable" because the record need only "'reasonably justify the findings made by the trier of fact'" even if "'the circumstances might also reasonably be reconciled with a contrary finding.'" (*Id.*, quoting *People v. Jennings* (2010) 50 Cal.4th 616, 638-639.)

This analysis essentially flips the *Canizales* standards on their head: the whole point, as the Court made clear, is to make sure "sufficient evidence exists to support a finding that *the only* reasonable inference" is the defendant acted with the specific intent to kill the primary target *and* with the concurrent intent to kill everyone else around the primary target in order to ensure the target's death. (*Canizales*, *supra*, 7 Cal.5th at p. 611-612.)

And, the well-settled standards of review for claims of instructional errors hold that this review is conducted *de novo* with the principal aim of determining "whether there is a reasonable likelihood that the trial court's instructions caused the jury to misapply the law in violation of the Constitution." (*People v.*

Mitchell (2019) 7 Cal.5th 561, 579.) Further, when the kill zone instruction had the effect of erroneously presenting the jury with a legally invalid theory of guilt, it is *the prosecution*, not the defendant, who bears the burden of persuasion on appeal, as the prosecution must "'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*People v. Aranda* (2012) 55 Cal.4th 342, 377, conc. opn. of Kennard, J., quoting *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

It is from this fundamentally flawed perspective that the Court of Appeal's opinion found all the relevant factors "sufficiently" supported the prosecution's theory of the case and thus that the attempted murder convictions were on solid ground. That is, the court found *regardless* of whether the evidence reasonably supported a contrary conclusion on any or all the factors, it *could* support the kill zone theory that Mackay was the "primary target" in this "last stand of a desperate killer" who "intended to kill anyone who ended up being outside Door 1 and Door 2" of the community room and created a kill zone for that purpose by firing a round at Door 1 and then "swe[eping] over to Door 2" with two more rounds, "blanket[ing]" this area "in front of

Door 1 and Door 2," in order to kill anyone who may have been trying to enter the room to apprehend him. (App. A at pp. 23-28.)

It was only through this same lens that the Court of Appeal's opinion reached the conclusion that Johnson was actually within the purported "kill zone," even though he was nowhere near "the area in front of Door 1 and Door 2" where Mackay was present at the time Mumin fired any of his gunshots because Johnson did not approach that area until after Mumin's gunfire had ceased. Consistent with a review that presumes every reasonably deducible fact in favor of the judgment, the court's opinion loosely construes the kill zone as "the area in front of Door 1 and Door 2, from the doors themselves to somewhere behind where Johnson was standing," because Johnson "could have" been struck by one or more of the bullets Mumin had fired. (App. A at p. 28.)

The court's opinion similarly sets aside too easily the problem that Mumin could not have known—and based on the most reasonable interpretation of all the evidence had no reason to know—that Johnson or *anyone* else was present outside, much less where any other people outside may have been located, because he was holed up behind a windowless wall when he fired these shots. The court simply concludes that it was reasonable to infer Mackay

was "unlikely to be alone" at the time he approached the doors. (App. A at pp. 27-28.) The logical extent of that rationale would permit a person to be convicted of attempted murder under the kill zone theory for *each and every* such person who happened to be in the presence of the alleged primary target and *regardless* of whether he had any reason to know anyone else was present. That contravenes the substantive law, because the necessary *concurrent* intent to kill the non-target victim(s) is obviously lacking, and it contravenes the important policy interests in *limiting* the prosecution's ability to rely upon this inherently troublesome theory of liability to obtain attempted murder convictions.

Mumin has already detailed at length in his prior briefing how the evidence not only supports but strongly and most reasonably supports a finding that he did *not* act with the requisite intent under all the relevant factors. Succinctly put, the undisputed evidence shows: (1) he persistently sought to *avoid* any contact with the alleged victims; (2) he employed a limited extent force in firing a single series of three gunshots at or towards Door 2 and then only *in reaction* to Mackay's attempt to enter the room

through Door 1;[8] (3) he could not have known or reasonably perceived who was present or where in the wide-open area of the complex; (4) neither of the victims (nor anyone else) was struck by the gunfire; and (5) the alleged kill zone ceased to exist by the time the alleged "nontarget victim" (Johnson) entered the zone of harm.

Mumin's analysis had no chance of carrying the day under the standards of review that the Court of Appeal's opinion employed, even though his analysis parallels that of the appellate courts that have reversed attempted murder convictions based on similar concerns. See e.g., *Mariscal*, *supra*, 47 Cal.App.5th at p. 139; *Thompkins*, *supra*, 50 Cal.App.5th at pp. 399-400; *Booker*, *supra*, 58 Cal.App.5th at p. 500; *Cardenas*, *supra*, 53 Cal.App.5th at p. 112-119; *In re Rayford*, *supra*, 50 Cal.App.5th at pp. 781-782.)

Of further concern, the trial court's instruction to the jury on the prosecution's kill zone theory failed to include the element most essential to a proper instruction according to *Canizales*—an

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[8] Again, neither the order of the shots nor the actual trajectory of the third bullet could be determined. The Court of Appeal's conclusion that Mumin first fired *at* Door 1 and then "swept over" to Door 2 to "blanket" the area in front of both doors simply adopts the prosecution's theory of the case, consistent with its overly deferential sufficiency-of-the-evidence review.

express admonition that the jury could not convict Mumin under this theory unless it found "the *only* reasonable inference" was that he intended to create a zone of fatal harm and kill everyone with it. (*Canizales*, *supra*, 7 Cal.5th at p. 608.) The instruction further misled the jury by vaguely defining the "zone of fatal harm" so as to broadly include any part of the wide-open field of unbounded space beyond the closed doors of the windowless wall of the community room in which Mumin was trying to avoid detection (2CT 383), particularly when this is coupled with the prosecutor's closing arguments persuading the jury to believe it could convict Mumin of attempted murder as to "every single officer" who was "outside the door" or otherwise "near" Mackay. (16RT 3840-3843.)

These arguments also had no chance of penetrating the Court of Appeal's judgment-deferential analysis, which set aside any concerns about the instruction's adequacy, whether legal or factual in nature, as "not the issue here." (App. A at pp. 19-20.) That *is* the issue and, under a proper analysis that considers the prejudicial impact of this legally and factually unsupported theory of kill zone liability, the error cannot be set aside as "harmless." But the Court of Appeal's opinion misses the entire landscape of applicable legal principles by its resting analysis far afield within

the paradigm of principles designed to simply review the record for sufficiency-of-the-evidence in support of the resulting outcome.

Review is necessary here.

II. The Trial Court's Implicit Criticism of Defense Counsel's "Approach" to the Closing Argument in the Jurors' Presence Violated Mumin's Fundamental Right to Counsel

Right after defense counsel finished her closing argument, the trial court announced that the proceedings would break for a recess after which the prosecution would make its rebuttal. However, while the jurors were still in the courtroom, the court questioned counsel about her closing argument as follows:

> The Court: [¶ . . . ¶] And for the record, this approach on the argument has been discussed with your client; is that correct?
>
> Ms. Ostbye: The –
>
> The Court: Approach that you just made.
>
> Ms. Ostbye: I would wait till everyone is out of the room.
>
> The Court: So the answer is 'yes.'
>
> Ms. Ostbye: Yes.
>
> The Court: Thank you.

(16RT 3864.)

Outside the presence of the jury, the court discussed with counsel and Mumin the strategies counsel had employed in arguing about the two incidents and conceding guilt on the assault and firearms charges, assessing the extent to which she had discussed those strategies with Mumin. (16RT 3865-3868.)

Once the proceedings resumed, the prosecution made its rebuttal argument, the argument session closed, and the court gave the final, pre-deliberation instructions. (16RT 3865-3874.)

On appeal, Mumin argued the trial court's questioning of defense counsel in the presence of the jury violated his state and federal constitutional right to counsel, which includes the "right of counsel to make a closing argument in a criminal case," because the questioning compromised this critical stage and the "last clear chance" for the defense to "'persuade the trier of fact that there may be reasonable doubt of the defendant's guilt.'" (*People v. Diggs* (1986) 177 Cal.App.3d 958, 969-970, quoting *Herring v. New York* (1975) 422 U.S. 853, 862.)

It necessarily "discredits the cause of the defense...." when the presiding judicial officer intervenes in such a way as to probe the defendant's attorney about the soundness of the defense

argument. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1320.) The court's questioning of counsel in the presence of the jurors about the "approach" she had taken for Mumin's closing argument called the integrity of the argument into doubt, clearly indicating the court believed the position of the defense and the points argued in support of it were questionable—questionable enough that the court thought it was important to ask if Mumin had agreed with the "approach" not just once, but a second time *after* counsel had cautioned this inquiry was inappropriate.

The most reasonable inference the jurors would have drawn, and thus the one they most likely drew, from these circumstances is that the judge presiding over their case found the defense argument suspect enough that he felt compelled to pry into the obviously sensitive and privileged matter of whether the defendant was truly on board with counsel's "approach."

This troublesome impression that the court left with the jurors certainly "*might* have tainted [their] decision" in rendering guilty verdicts and true findings across the board of charges and allegations. (*People v. Pearson* (2013) 56 Cal.4th 393, 463, italics added.) Because nothing in the record allows this possibility to be set aside with any real confidence that the outcome was "*surely*

unattributable to the error," the outcome cannot stand and the convictions must reversed. (*Ibid.*, italics added.)

The Court of Appeal found that Mumin forfeited this issue by not objecting again after the jurors left the courtroom. (App. A at p. 29.) However, the failure to press an objection does not result in forfeiture when the action would be futile, particularly when an admonishment could aggravate the situation. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1201 ["A defendant will be excused from the requirement of making a timely objection and/or a request for admonition if either would have been futile."].) Indeed, had counsel pressed the point with the court outside the presence of the jury, the only conceivable remedy would have been to admonish the jury to disregard the court's questioning of defense counsel, and that would have carried the risk of highlighting the troublesome questioning even further.

On the merits, the Court of Appeal's opinion simply concludes it is "unlikely a lay jury understood that the trial court's question was unusual in any way" and it did "not imply any criticism of the argument." (App. A at p. 30.) However, as discussed, not only *could* they have perceived that the presiding judicial officer found the "approach" of the defense to be logically

and/or ethically suspect, but that was the inference they were most likely to have drawn under the circumstances. And again, the reversible prejudice cannot be set aside given the risk that the questioning "might have tainted" the jury's decision-making. (*People v. Pearson*, *supra*, 56 Cal.4th at p. 463.)

CONCLUSION

Mumin respectfully requests this Court grant his petition.

Dated: September 27, 2021

Respectfully submitted,

_____
Raymond M. DiGuiseppe,
Attorney for Ahmed Mumin

CERTIFICATE OF COMPLIANCE

I certify that this brief is prepared with 13 point Century Schoolbook font and contains 6,482 words.

Dated: September 27, 2021

Respectfully submitted,

_____
Raymond M. DiGuiseppe,
Attorney for Ahmed Mumin

DECLARATION OF SERVICE

Re: ***People v. Mumin*, Supreme Court Case No. _____**
Court of Appeal Case No. D076916

I, Raymond M. DiGuiseppe, declare that I am over the age of 18 and not a party to this case. My business address is: P.O. Box 10790, Southport, NC 28461.

Postal Service

On September 27, 2021, I served the foregoing Petition for Review on each of the parties listed below, by placing a true copy of it in a sealed addressed envelope with postage fully paid and depositing it with the United States Postal Service in Southport, North Carolina, to be delivered in the ordinary course of business:

Ahmed Mumin, CDCR# BL1095
C.C.I., 4B, 2A
P.O. Box 1906
Tehachapi, CA 93581

Electronic Service

I further declare that on September 27, 2021, I served the same document on each of the entities listed below through court-approved electronic process:

Court of Appeal, Fourth Dist., Div. 1: e-served through Truefiling
San Diego County Superior Court: e-served through Truefiling
Appellate Defenders, Inc.: e-served through Truefiling
Attorney General's Office: e-served through Truefiling
District Attorney's Office: e-served through Truefiling
Sloan Ostbye (trial counsel): e-served through Truefiling

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and was executed on September 27, 2021.

Raymond M. DiGuiseppe	*/s/ Raymond M. DiGuiseppe*
Declarant	Signature

APPENDIX A
COURT OF APPEAL OPINION

Filed 8/19/21

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. AHMED MUMIN, Defendant and Appellant.	D076916 (Super. Ct. No. SCD261780)

APPEAL from a judgment of the Superior Court of San Diego County, Kenneth K. So, Judge. Affirmed as modified.

Raymond M. DiGuiseppe, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Matthew Rodriquez, Acting Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette Cavalier and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Ahmed Mumin of first degree murder (Pen. Code, §§ 187, subd. (a), 189),[1] burglary (§ 459), and robbery (§ 211). It found true the special circumstance allegations that the murder was committed during the commission of a robbery and a burglary. (§ 190.2, subd. (a)(17).) The jury also convicted Mumin on two counts of premeditated attempted murder of a peace officer (§§ 187, subd. (a), 189, 664), two counts of assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2)), two counts of assault with a semiautomatic firearm (*id.*, subd. (b)), and one count each of possession of a firearm by a felon (§ 29800, subd. (a)(1)) and possession of ammunition by a prohibited person (§ 30305, subd. (a)(1)). The jury found true various firearm enhancements. (§§ 1192.7, subd. (c)(23), 12022.5, subd. (a), 12022.53, subds. (b), (c), (d).) The trial court sentenced Mumin to life imprisonment without the possibility of parole, plus an additional consecutive indeterminate term of 55 years to life imprisonment and a consecutive determinate term of 41 years four months.

Mumin appeals. He contends (1) the evidence did not support a jury instruction on the kill zone theory of attempted murder liability, (2) the trial court committed prejudicial misconduct by questioning Mumin's counsel about her closing argument in the presence of the jury, and (3) his convictions for assault with a semiautomatic firearm should be vacated because they are lesser included offenses of assault on a peace officer with a semiautomatic firearm. The Attorney General concedes the two assault convictions should be vacated or reversed, and we accept this concession. Mumin's two remaining contentions are without merit. We therefore modify the judgment

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1 Subsequent statutory references are to the Penal Code.

to vacate the two assault convictions (and the stayed sentences thereon) and affirm the judgment as modified.

FACTS

On April 15, 2015, a clerk was working the night shift at a convenience store in San Diego. A regular customer, Eric Schade, came into the store around 11:00 p.m. and bought a can of beer. He returned a few hours later and asked to borrow a lighter. The clerk thought Schade may have been intoxicated.

As Schade and the clerk talked, a man walked into the store and started yelling. He said, "Everybody get down," and the clerk immediately recognized that he was being robbed. The clerk removed the tray from a cash register and placed it on the counter. The tray contained small bills, since the clerk put larger bills into the safe.

The clerk crouched behind the counter and saw that the man was holding a large silver semiautomatic handgun. The man was pointing the handgun at Schade and telling him to get down. Schade did not respond, and the clerk thought there may have been a struggle. The man shot Schade, took money from the cash register tray, and left the store. The clerk called police and checked on Schade, who was unconscious on the floor of the store.

When the man entered the store, he was wearing a bandana around his face. During the robbery, the bandana began to come loose, and the clerk could see the man's face. The clerk later identified Mumin as the man who robbed the store and shot Schade.

Police arrived and found Schade lying face down, surrounded by blood. Paramedics took him to a hospital, where he later died. A medical examiner determined that his cause of death was a single gunshot wound to the chest.

A San Diego Police Department criminalist performed expedited, same-day DNA testing on a nine-millimeter cartridge casing found at the scene, as well as a knit cap found nearby. Based on that testing, the criminalist identified Mumin as a potential source of DNA obtained from the items.[2]

Homicide detectives provided Mumin's information to the police department's special investigations unit. The special investigations unit focuses on tracking, locating, and arresting felony suspects. They work in plain clothes, often undercover. Detectives with the special investigations unit identified two addresses that might be associated with Mumin. One detective, Luke Johnson, made contact with Mumin on social media using an assumed identity. Based on that contact, detectives believed Mumin was at an apartment complex on Winona Avenue in San Diego. Johnson attempted to set up a meeting with Mumin using his assumed identity, but he was unsuccessful.

Nonetheless, the detectives gathered at the apartment complex and began surveillance. The complex consisted of several buildings, pedestrian walkways, and a parking lot.

Mumin was at the complex. He encountered a relative and asked him for a ride. The relative asked where he wanted to go, and Mumin replied, "Anywhere." Mumin also asked whether there were police outside the complex, which made the relative hesitant to help him. They talked for a little while. To avoid giving Mumin a ride, the relative told Mumin he had to leave behind a backpack he was carrying, but Mumin was "very adamant"

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[2] Subsequent testing confirmed, to a high degree of certainty, that Mumin's DNA matched the DNA on the cartridge casing. He was also included as a possible major contributor to the mix of DNA obtained from the knit cap.

about keeping it. Eventually the relative told Mumin he would give him a ride, but the relative did not intend to follow through. The relative went out to his car, got a drink, and came back. He did not see Mumin again.

Meanwhile, the detectives had information that one of Mumin's family members might live in a specific apartment, so they decided to send one detective into the complex to locate it. Several detectives, along with a number of uniformed police officers, waited outside.

The detective walked into the complex on foot. He was not wearing anything that would identify him as a police officer. He saw one individual, who gave him an unfriendly look. The detective continued walking and saw a second individual, likely Mumin, who was holding a dark colored backpack. Mumin noticed the detective and looked startled or scared. He backed away and then turned and ran. The detective told his sergeant about the encounter, and the sergeant told the detective to leave the complex while they formulated a plan.[3]

Police surveillance of the apartment complex continued. Over the radio, the detectives heard that a person in another apartment had reported a burglary in progress. Several uniformed officers went into the complex to investigate. The officers found a backpack near the apartment. The backpack contained Mumin's identification card, several rounds of nine-millimeter ammunition, and a cell phone. The officers broadcast their discovery over the radio.

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[3] Mumin's relative testified that he saw a person who appeared to be an undercover detective when he was walking back from his car. The relative surmised that Mumin would stay hidden while the detective was present, so he used the opportunity to walk back to his family's apartment and go inside.

Based on that information, the detectives were more confident Mumin was in the complex somewhere. They decided to conduct a search. They gathered in the parking lot and put on tactical vests identifying themselves as police officers. The vests have a police badge on the front and the word "police" in large white letters on the back. Some vests have the word "police" in white letters on the front as well. The five detectives were joined by more than a dozen uniformed officers.

The detectives and uniformed officers went apartment-by-apartment loudly identifying themselves as police and directing the residents to come outside. It was nighttime and dark. A police helicopter flew overhead to assist in the search for Mumin. It spent approximately an hour over the complex.

Eventually two detectives, Johnson and James Mackay, walked over to a building with four doors closely spaced together on the first floor and apartments above. Police officers had just cleared the apartments on the upper floor.

All four doors on the first floor led to a large community room, although the detectives did not know that at the time. The doors were closed. Mackay approached the right-most door (Door 1). It had hinges on the right and its handle was on the left. Mackay stood slightly to the right, in front of the hinges, and reached for the handle. Johnson followed Mackay and positioned himself approximately 25 feet behind and to the left, in front of a neighboring door (Door 2). They appear to have been double doors; the handle of Door 2 was approximately 12 to 18 inches away from the handle of Door 1.

Mackay turned the handle and began to open the door. Mumin was hiding inside the community room and responded with gunfire. He fired three shots. Mackay and Johnson both moved to the right, toward the corner

of the building, and took cover. Johnson shot five times through Door 1. Mackay tripped and fell over a short wall, recovered, and shot three times at Door 1. Mackay injured his left hand and suffered some scrapes when he fell.

Numerous police officers converged on the community room. After the gunfire stopped, police commanded Mumin to exit the room. Mumin complied. He had been shot, and he was transported to a hospital for medical treatment. Police recovered a nine-millimeter semiautomatic handgun from the community room, as well as a handgun magazine with blood on it.

Forensic analysis revealed that Mumin shot once through the opening in Door 1 and twice through the closed, neighboring Door 2. The latter two bullets apparently penetrated through Door 2. All three struck near a trash area some distance away. The three bullets, as well as the bullet that killed Schade earlier, were fired by the handgun recovered from the community room. Mumin used hollow-point ammunition, which has a cavity in the nose portion of the projectile. When a hollow-point projectile hits its target, the cavity fills and causes the rest of the material to expand into a mushroom shape. DNA testing of the handgun and associated magazine revealed strong support for the inclusion of Mumin in the mixture of DNA found on those items.

At trial, Mumin called a police department criminalist to testify. She said she recovered $281 in cash from Mumin at the hospital, consisting of two $100 bills and several smaller bills. In closing argument, Mumin's counsel denied that he was the man who robbed the convenience store or shot Schade. But she conceded that Mumin was in the community room and shot at the officers. She argued that he only intended to warn them, not to kill them.

DISCUSSION

I

Kill Zone Instruction

A

Mumin first contends the trial court erred by instructing the jury on the kill zone theory of attempted murder liability because there was insufficient evidence to support it under *People v. Canizales* (2019) 7 Cal.5th 591 (*Canizales*). *Canizales* clarified the scope of the kill zone theory of liability and provided guidance to courts considering such an instruction. It held, among other things, "Trial courts should tread carefully when the prosecution proposes to rely on such a theory, and should provide an instruction to the jury only in those cases where the court concludes there is sufficient evidence to support a jury determination that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm. The use or attempted use of force that merely *endangered* everyone in the area is insufficient to support a kill zone instruction." (*Id.* at p. 608.)

The emphasis in *Canizales* on the "*only* reasonable inference" has led to a dispute in this appeal regarding the proper standard of review of a trial court's decision to instruct on this theory of liability. (*Canizales*, *supra*, 7 Cal.5th at p. 608.) Mumin argues, with some support in recent caselaw, that we must ourselves be convinced that the only reasonable inference from the evidence is that the defendant had the requisite intent. (See, e.g., *In re Rayford* (2020) 50 Cal.App.5th 754, 779 (*Rayford*).) The Attorney General responds, based on established principles of substantial evidence review, that it is sufficient if we conclude the evidence supports a reasonable inference that the defendant had the requisite intent, even if our review of the evidence

indicates the opposite inference would also be reasonable. (See, e.g., *People v. Ghobrial* (2018) 5 Cal.5th 250, 277-278 (*Ghobrial*); *People v. Cole* (2004) 33 Cal.4th 1158, 1206 (*Cole*).)

We agree with the Attorney General. *Canizales* does not depart from, and instead reaffirms, established principles governing a trial court's decision to instruct on a theory of liability and an appellate court's review of such a decision. The trial court must determine whether the evidence would support a *jury determination* that the only reasonable inference was that the defendant held the requisite intent. If a trial court's decision to instruct is challenged on appeal, we must make the same determination on de novo review. But, in so doing, the issue is not whether we believe the only reasonable inference from the evidence is that the defendant had the requisite intent—just as, in other substantial evidence contexts, the issue is not whether we believe the defendant to be guilty beyond a reasonable doubt. The issue is whether the evidence would support such a determination by the jury. Under these circumstances, it is well established that the evidence supports a jury determination that an inference is the *only* reasonable inference if we conclude it is at least *a* reasonable inference. We disagree with *Rayford* to the extent it holds otherwise. We explain our reasoning in greater detail below.

Canizales comprehensively examined the origin and development of the kill zone theory of attempted murder liability. It explained, "To prove the crime of attempted murder, the prosecution must establish 'the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' " (*Canizales*, *supra*, 7 Cal.5th at p. 602.) "Direct evidence of intent to kill is rare, and ordinarily the intent to kill must be inferred from the statements and actions of the defendant and the

circumstances surrounding the crime." (*Ibid*.) The kill zone theory defines a specific category of circumstantial evidence that may support a defendant's intent to kill: "The kill zone theory looks to circumstantial evidence to support a permissive inference regarding a defendant's intent." (*Id*. at p. 606.) But in the absence of precise definition and proper jury instructions, "the potential for misapplication of the kill zone theory remains troubling." (*Id*. at p. 607.)

The Supreme Court therefore held "that the kill zone theory for establishing the specific intent to kill required for conviction of attempted murder may properly be applied only when a jury concludes: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm. Taken together, such evidence will support a finding that the defendant harbored the requisite specific intent to kill both the primary target and everyone within the zone of fatal harm." (*Canizales*, *supra*, 7 Cal.5th at p. 607.)

The Supreme Court stressed that evidence supporting the kill zone theory will rarely be found: "We emphasize that going forward trial courts must exercise caution when determining whether to permit the jury to rely upon the kill zone theory. Indeed, we anticipate there will be relatively few cases in which the theory will be applicable and an instruction appropriate. Trial courts should tread carefully when the prosecution proposes to rely on such a theory, and should provide an instruction to the jury only in those

cases where the court concludes there is sufficient evidence to support a jury determination that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm. The use or attempted use of force that merely *endangered* everyone in the area is insufficient to support a kill zone instruction." (*Canizales*, *supra*, 7 Cal.5th at p. 608.)

Turning to the record before it, the Supreme Court framed its standard of review as follows: " ' "It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference." ' " (*Canizales*, *supra*, 7 Cal.5th at p. 609.)

The Supreme Court noted that the evidence supported the inference that one victim was the defendants' primary target. (*Canizales*, *supra*, 7 Cal.5th at p. 609.) But, it explained, "an instruction on the kill zone theory would have been warranted in this case only if there was substantial evidence in the record that, if believed by the jury, would support *a reasonable inference* that defendants intended to kill everyone within the 'kill zone.' To qualify, the record would need to include (1) evidence regarding the circumstances of defendants' attack on [the primary target] that would support a reasonable inference that defendants intentionally created a zone of fatal harm around him, and (2) evidence that [the nontarget victim] was located within that zone of fatal harm. Taken together, such evidence would permit a finding that defendants harbored the requisite intent to kill [the nontarget victim] because he was within the zone of fatal harm that defendants intended to create around [the primary target]." (*Id*. at pp. 609-610, italics added.) The Supreme Court considered and rejected the Attorney General's claim that the evidence was sufficient. It concluded "the evidence

concerning the circumstances of the attack . . . was not sufficient to support *a reasonable inference* that defendants intended to create a zone of fatal harm around a primary target." (*Id*. at p. 610, italics added.)

Canizales reflects established principles of appellate review following a trial court's decision to instruct on a theory of liability. "A trial court must instruct the jury on every theory that is supported by substantial evidence, that is, evidence that would allow a reasonable jury to make a determination in accordance with the theory presented under the proper standard of proof. [Citation.] We review the trial court's decision de novo. In so doing, we must determine whether there was indeed sufficient evidence to support the giving of [the] instruction. Stated differently, we must determine whether a reasonable trier of fact could have found beyond a reasonable doubt that defendant committed [the offense based on the proffered theory]." (*Cole*, *supra*, 33 Cal.4th at p. 1206; accord, *People v. Montoya* (1994) 7 Cal.4th 1027, 1047 ["The trial court is charged with instructing upon every theory of the case supported by substantial evidence"]; *People v. Ceja* (1993) 4 Cal.4th 1134, 1142-1143 (*Ceja*).) "There is no instructional error when the record contains substantial evidence in support of a guilty verdict on the basis of the challenged theory." (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1290 (*Jantz*).)

Our review following a trial court's decision to instruct is therefore governed by familiar principles of substantial evidence review. (*People v. Nelson* (2016) 1 Cal.5th 513, 550 [recognizing it is "essentially the same standard"].) "We 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable

doubt.' [Citation.] In determining whether a reasonable trier of fact could have found [the defendant] guilty beyond a reasonable doubt, we presume in support of the judgment ' "the existence of every fact the trier could reasonably deduce from the evidence." ' " (*Ibid*.)

"Appellate inquiry into the sufficiency of the evidence 'does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In other words, 'it is the jury, not the appellate court which must be convinced of the defendant's guilt.' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055-1056.)

" ' " 'The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] " 'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " ' " ' " (*Ghobrial*, *supra*, 5 Cal.5th at pp. 277-278.)

" ' " 'An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise.' " ' " (*People v. Salazar* (2016) 63 Cal.4th 214, 242.) "The choice of which inference is to be drawn from the facts, where more than one

reasonable inference is possible, is the function of the jury." (*People v. Sweeney* (1960) 55 Cal.2d 27, 51; accord, *People v. Cardenas* (2020) 53 Cal.App.5th 102, 120 (*Cardenas*).) "The presence of substantial evidence supporting the [challenged] jury instruction is not undermined by the existence of other interpretations of the evidence." (*Jantz*, *supra*, 137 Cal.App.4th at p. 1291.)

The distinction between the jury, on one hand, and the appellate court, on the other, reflects the fundamental rule that the jury, not the appellate court, must be convinced of the defendant's guilt beyond a reasonable doubt. A jury must acquit a defendant if a reasonable alternative interpretation of the evidence suggests innocence, because it necessarily creates reasonable doubt. A conviction is only warranted if the jury believes the *only* reasonable interpretation of the evidence suggests guilt. But if an appellate court identifies a reasonable alternative interpretation based on its own review of the evidence, it does not necessarily compel reversal, because an appellate court need not be convinced of a defendant's guilt beyond a reasonable doubt. Instead, as noted, the appellate court asks whether the *jury* could have found the defendant guilty beyond a reasonable doubt. It is the jury, of course, that sees and hears the evidence. The appellate court has only the cold record before it. An appellate court's ability to identify a reasonable alternative inference suggesting innocence does not mean that the jury, viewing the evidence live at trial, could not have rejected that inference as unreasonable. As one early case straightforwardly explained, "A conviction may not be set aside because the evidence is susceptible of two reasonable inferences, one

looking to the guilt of the defendant and the other to his innocence." (*People v. Green* (1939) 13 Cal.2d 37, 42.)[4]

Thus, in *Canizales*, the Supreme Court explained that a kill zone instruction was proper where "there is sufficient evidence to support a *jury determination* that the *only* reasonable inference from the circumstances of the offense is that a defendant intended to kill everyone in the zone of fatal harm," i.e., where there is sufficient evidence to support a jury finding of intent beyond a reasonable doubt. (*Canizales*, *supra*, 7 Cal.5th at p. 608, first italics added.) And, because it is the *jury* that must be convinced beyond a reasonable doubt, the Supreme Court did not require that the *appellate court* itself determine whether the inference supporting the instruction was the only reasonable inference. Instead, it explained, "an instruction on the kill zone theory would have been warranted in this case only if there was substantial evidence in the record that, if believed by the jury, would support *a reasonable inference* that defendants intended to kill everyone within the 'kill zone.' " (*Id.* at pp. 609-610, italics added.) In other words, " ' " evidence must appear in the record which, if believed by the jury, will support the suggested inference." ' " (*Id.* at p. 609.) An appellate court need not determine that such an inference is the *only* reasonable inference.

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4 One long-standing example of this standard involves the intent element for burglary, which must also generally be proved using circumstantial evidence: "Although the People must show that a defendant charged with burglary entered the premises with felonious intent, such intent must usually be inferred from all of the facts and circumstances disclosed by the evidence, rarely being directly provable. [Citations.] When the evidence justifies *a reasonable inference* of felonious intent, the verdict may not be disturbed on appeal." (*People v. Matson* (1974) 13 Cal.3d 35, 41, italics added; accord, *People v. Carter* (2005) 36 Cal.4th 1215, 1260-1261.) For an appellate court, the evidence must support a reasonable inference of the requisite intent; it need not be the only reasonable inference.

Mumin points to a portion of the introduction in *Canizales*, where the Supreme Court emphasized the following: "We caution . . . that trial courts must be extremely careful in determining when to permit the jury to rely upon the kill zone theory. The kill zone theory permits a jury to infer a defendant's intent to kill an alleged attempted murder victim from circumstantial evidence (the circumstances of the defendant's attack on a primary target). But, under the reasonable doubt standard, a jury may not find a defendant acted with the specific intent to kill everyone in the kill zone if the circumstances of the attack would also support a reasonable alternative inference more favorable to the defendant. (See CALCRIM No. 225.) Permitting reliance on the kill zone theory in such cases risks the jury convicting a defendant based on the kill zone theory where it would not be proper to do so. As past cases reveal, there is a substantial potential that the kill zone theory may be improperly applied, for instance, where a defendant acts with the intent to kill a primary target but with only conscious disregard of the risk that others may be seriously injured or killed. Accordingly, in future cases trial courts should reserve the kill zone theory for instances in which there is sufficient evidence from which the jury could find that the *only* reasonable inference is that the defendant intended to kill (not merely to endanger or harm) everyone in the zone of fatal harm." (*Canizales*, *supra*, 7 Cal.5th at p. 597.)

This passage might be read to suggest that a trial court should not instruct the jury on the kill zone theory of liability "if the circumstances of the attack would also support a reasonable alternative inference more favorable to the defendant." (*Canizales*, *supra*, 7 Cal.5th at p. 597.) But, after this statement, the Supreme Court goes on to repeat the standard formulation: "Accordingly, in future cases trial courts should reserve the kill

zone theory for instances in which there is sufficient evidence from which the jury could find that the *only* reasonable inference is that the defendant intended to kill . . . everyone in the zone of fatal harm." (*Ibid*.) As noted, this formulation is simply another way of saying that the evidence must support a defendant's guilt beyond a reasonable doubt. It does not imply any change to the established standard of review where the prosecution relies on circumstantial evidence. If the evidence supports a reasonable inference of the requisite intent, it necessarily follows that the jury could find it was the only reasonable inference. *Canizales* confirms this principle: "[A]n instruction on the kill zone theory would have been warranted in this case only if there was substantial evidence in the record that, if believed by the jury, would support *a reasonable inference* that defendants intended to kill everyone within the 'kill zone.' " (*Id*. at pp. 609-610, italics added.) Moreover, if *Canizales* had intended to change the established standard of review, the Supreme Court likely would have engaged in a more extensive discussion of the standard and why it should be changed. The Supreme Court's use of the established standard in its own discussion confirms no change was intended.

As noted, Mumin relies heavily on *Rayford* for a different standard. In *Rayford*, two defendants were convicted of attempted murder based on the kill zone theory of liability. (*Rayford*, *supra*, 50 Cal.App.5th at p. 765.) On direct appeal, the court rejected one defendant's contention that the evidence was insufficient to support his convictions. (*Id*. at p. 766.) Later, in two habeas corpus petitions, the defendants challenged the sufficiency of the evidence under *Canizales*. (*Id*. at p. 767.) After holding that *Canizales* was retroactive, the appellate court proceeded to determine "whether 'there is sufficient evidence from which the jury could find that the *only* reasonable

inference is that the defendant intended to kill (not merely to endanger or harm) everyone in the zone of fatal harm[.]' " (*Id.* at p. 779, quoting *Canizales*, *supra*, 7 Cal.5th at p. 597.) It noted, "The People argue the circumstances of the shooting here support a reasonable inference the shooters intended to kill everyone in the zone of fatal harm around [the primary target]." (*Rayford*, at p. 779.) After reviewing certain facts supporting the kill zone theory, the court stated, "These facts supported our decision [on direct appeal]." (*Ibid.*) It went on, "However, other circumstances support a reasonable alternative inference more favorable to [the defendants], that the shooters acted not with the specific intent to kill everyone in and in front of the house, but with conscious disregard of the risk [several people] might be seriously injured or killed." (*Ibid.*)

After reviewing the facts and various authorities, *Rayford* concluded, "In light of these facts, coupled with the method of force employed . . . , there is not sufficient evidence from which the jury could find the *only* reasonable inference is that the shooters intended to kill everyone in a zone of fatal harm. [Citation.] Rather, a reasonable alternative inference is that the shooters fired on the house . . . , with conscious disregard of the risk [the primary target] and the others inside and in front of the house would be seriously injured or killed." (*Rayford*, *supra*, 50 Cal.App.5th at pp. 780-781.)

Rayford did not discuss the standard of review in detail. It correctly framed the issue as "whether 'there is sufficient evidence from which the jury could find that the *only* reasonable inference is that the defendant intended to kill (not merely to endanger or harm) everyone in the zone of fatal harm[.]' " (*Rayford*, *supra*, 50 Cal.App.5th at p. 779, quoting *Canizales*, *supra*, 7 Cal.5th at p. 597.) But it proceeded to distinguish between one apparently reasonable inference drawn from the evidence, which would

support the kill zone theory, and a "reasonable alternative inference," which would not. (*Rayford*, at p. 779) Based on its identification of a "reasonable alternative inference," *Rayford* concluded that the trial court erred in instructing the jury on the kill zone theory. (*Id*. at p. 781.) In this context, the court noted that one piece of evidence was "as consistent with a specific intent to kill as with an intent to punish . . . , with conscious disregard of the risk of fatal harm or serious injury to [the primary target] and [their] family and neighbors." (*Ibid*.)

Rayford's analysis appears inconsistent with the principles of substantial evidence review described above. "A reviewing court may not substitute its judgment for that of the jury. It must view the record favorably to the judgment below to determine whether there is evidence to *support* the instruction, not scour the record in search of evidence suggesting a contrary view." (*Ceja*, *supra*, 4 Cal.4th at p. 1143.) "The presence of substantial evidence supporting the [challenged] jury instruction is not undermined by the existence of other interpretations of the evidence." (*Jantz*, *supra*, 137 Cal.App.4th at p. 1291.)

While it is not entirely clear, to the extent *Rayford* believed that one reasonable inference from the evidence would support a kill zone instruction under *Canizales*, but a reasonable alternative inference would not, the correct result would have been to uphold the instruction. Where there is "substantial evidence in the record that, if believed by the jury, would support a reasonable inference that defendants intended to kill everyone within the 'kill zone,' " a trial court's decision to instruct on the kill zone theory of liability should be affirmed. (*Canizales*, *supra*, 7 Cal.5th at pp. 609-610.) The fact that an appellate court can identify a reasonable alternative inference pointing to a different intent does not warrant reversal.

Mumin also relies on *People v. Mitchell* (2019) 7 Cal.5th 561, 579, but the alleged instructional error here is not comparable. *Mitchell* considered whether a jury instruction misstated the law, not whether an instruction was supported by the evidence. Similarly, Mumin cites *People v. McCloud* (2017) 15 Cal.App.5th 948, 956-957, for its discussion of the harmless-beyond-a-reasonable-doubt standard of prejudice where a jury instruction omits an element of an offense. Again, that is not the issue here. We note that Mumin's trial took place a few months after *Canizales* was decided, and the trial court instructed the jury using a modified form instruction to account for its holding. Mumin does not argue, as an independent ground for reversal, that this modified instruction prejudicially misstated the law.

B

Substantively, *Canizales* set out two elements that must be met for the kill zone theory to apply: "[T]he kill zone theory for establishing the specific intent to kill required for conviction of attempted murder may properly be applied only when a jury concludes: (1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm. Taken together, such evidence will support a finding that the defendant harbored the requisite specific intent to kill both the primary target and everyone within the zone of fatal harm." (*Canizales*, *supra*, 7 Cal.5th at p. 607.)

"In determining the defendant's intent to create a zone of fatal harm and the scope of any such zone, the jury should consider the circumstances of the offense, such as the type of weapon used, the number of shots fired (where a firearm is used), the distance between the defendant and the alleged victims, and the proximity of the alleged victims to the primary target. Evidence that a defendant who intends to kill a primary target acted with only conscious disregard of the risk of serious injury or death for those around a primary target does not satisfy the kill zone theory. As the Court of Appeal recently explained in *People v. Medina* (2019) 33 Cal.App.5th 146, 156 . . . , the kill zone theory does not apply where 'the defendant merely subjected persons near the primary target to lethal risk. Rather, in a kill zone case, the defendant has a primary target and reasons [that] he cannot miss that intended target if he kills everyone in the area in which the target is located. In the absence of such evidence, the kill zone instruction should not be given.' " (*Canizales*, *supra*, 7 Cal.5th at p. 607.)

Turning to the facts before it, *Canizales* tailored the general standard of review to the evidence in the record: "[A]n instruction on the kill zone theory would have been warranted in this case only if there was substantial evidence in the record that, if believed by the jury, would support a reasonable inference that defendants intended to kill everyone within the 'kill zone.' To qualify, the record would need to include (1) evidence regarding the circumstances of defendants' attack on [the primary target] that would support a reasonable inference that defendants intentionally created a zone of fatal harm around him, and (2) evidence that [the nontarget victim] was located within that zone of fatal harm. Taken together, such evidence would permit a finding that defendants harbored the requisite intent to kill [the nontarget victim] because he was within the zone of fatal harm that

defendants intended to create around [the primary target]." (*Canizales*, *supra*, 7 Cal.5th at pp. 609-610.)

In *Canizales*, the evidence showed that the shooter fired five bullets, from around 100 feet away, on a wide city street. (*Canizales*, *supra*, 7 Cal.5th at p. 611.) The bullets were " 'going everywhere' " and did not hit anyone. (*Ibid*.) The Supreme Court concluded "that the evidence concerning the circumstances of the attack (including the type and extent of force used by [the shooter]) was not sufficient to support a reasonable inference that defendants intended to create a zone of fatal harm around a primary target." (*Id*. at p. 610.) An instruction on the kill zone theory of liability was therefore unwarranted. (*Id*. at p. 611.)

By contrast, the Supreme Court approved of a kill zone instruction in the earlier case of *People v. Bland* (2002) 28 Cal.4th 313. "The record there showed that the defendant and a fellow gang member approached a car in which a rival gang member was sitting in the driver's seat and opened fire with a .38-caliber handgun, shooting numerous rounds both into the vehicle and at the vehicle as it drove away. The driver was killed and his two passengers, who were not gang members, were wounded. [Citation.] [The Supreme Court] concluded that the evidence 'virtually compelled' a finding that even if the defendant primarily intended to kill the rival gang member, he also, concurrently, intended to kill the passengers in the car, or, at the least, intended to create a zone of fatal harm." (*Canizales*, *supra*, 7 Cal.5th at p. 603, citing *Bland*, at pp. 318, 333.)

Following *Canizales*, courts found sufficient evidence to support a kill zone conviction or instruction where the defendants rapidly fired 21 shots "into a small space enclosed on three sides" (*People v. Dominguez* (2021) 66 Cal.App.5th 163, 187); where the defendants fired multiple bullets "at

close range against two people who were walking side by side in such close proximity that they fell into each other" (*People v. Windfield* (2021) 59 Cal.App.5th 496, 517); and where a defendant fired 16 rounds from a high-powered assault rifle at an occupied house, "targeting specific locations of the house where the victims were present," and apparently another defendant fired at least six shots at another house using the same high-powered assault rifle (*People v. Cerda* (2020) 45 Cal.App.5th 1, 17 (*Cerda*), review granted May 13, 2020, S260915). Courts have found insufficient evidence where the defendant fired three to seven shots at the driver of a stationary car at close range, missing the passenger, "but there were no bullet holes in the car's body or doors that would have reflected a spray of bullets" (*People v. Booker* (2020) 58 Cal.App.5th 482, 500); where the defendant first fired directly at his target, "did not sweep his arm from side to side or spray the area with bullets," and thereafter fired while retreating, placing distance and obstructions between himself and other potential victims (*Cardenas*, *supra*, 53 Cal.App.5th at pp. 114, 115); and where the defendant fired first at his

intended target and, after the target was mortally wounded, turned and fired at other victims (*People v. Mariscal* (2020) 47 Cal.App.5th 129, 139).[5]

Here, as an initial matter, Mumin contends there was insufficient evidence of a "primary target" that he specifically intended to kill. The kill zone theory of liability requires a primary target. (*Canizales*, *supra*, 7 Cal.5th at p. 608; *People v. Thompkins* (2020) 50 Cal.App.5th 365, 394-395.) The prosecution's theory was that Mackay was Mumin's primary target. The jury could reasonably find that Mumin fired at Mackay through the opening in Door 1, at close range, just as Mackay began to open it. This evidence is sufficient to support a reasonable inference that Mumin intended to kill Mackay. "The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . .' "

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5 In *Rayford*, the defendants fired at a gathering of people, and the house behind them, from approximately 30 feet away. (*Rayford*, *supra*, 50 Cal.App.5th at p. 762.) In support of a kill zone instruction, *Rayford* noted, "A series of eight bullets struck the house in an area surrounding [the primary target] and the others on the grass, who had limited means of escape as they funneled into the entrance of the house. One bullet struck [another person]. The gunfire that traveled from east to west was powerful enough to pierce multiple walls within the house." (*Id.* at p. 779.) In support of the "reasonable alternative inference," *Rayford* noted, "Each shooter shot at most four bullets at the house . . . . [One defendant] was standing in front of [the primary target], but he shot 'directly towards the house,' not at her. He also fired at the front window where no one was standing, but a cousin was looking out. [The other defendant] only shot into the air. Neither [the primary target] nor [another individual] testified any shooter targeted specific victims. The eight bullets that were recovered were not fired at a specific location, instead striking the house from the window to the right of the front door to the wood to the left of the door. Although the weapons had sufficient force to pierce the walls of the house, there was no evidence the guns were rapid-firing semiautomatic or automatic weapons." (*Ibid.*)

(*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690; accord, *People v. Perez* (2010) 50 Cal.4th 222, 230.) Mumin emphasizes other facts, such as his apparent desire to avoid confrontation by hiding in the community room, but they do not make an inference of intent to kill unreasonable. Contrary to Mumin's suggestion, we do not reweigh the evidence on appeal. "We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639; accord, *Jantz*, *supra*, 137 Cal.App.4th at p. 1291.)

In his opening brief, Mumin claims he only fired at Door 2, not Door 1, and therefore did not target Mackay. He cites only his counsel's closing argument as support. His counsel's argument is not evidence. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 413, fn. 11; *People v. Superior Court* (*Crook*) (1978) 83 Cal.App.3d 335, 341.) The evidence plainly supports the reasonable inference that Mumin fired three shots, two that went through Door 2 (because it had two bullet holes going from inside the community room outward) and one that went through the opening in Door 1. Indeed, on reply, Mumin appears to backtrack, noting that "two of the three shots went through Door 2" and the third went somewhere else. Mumin has not shown the evidence did not support his specific intent to kill Mackay as the primary target.

Mumin next contends there was insufficient evidence that he intended to create a zone of fatal harm around Mackay, i.e., an area in which Mumin intended to kill everyone present to ensure Mackay's death. We disagree. Based on the evidence, the jury could reasonably have found the following:

Mumin armed himself with a semiautomatic firearm and hollow-point bullets. Hollow-point bullets are particularly damaging based on their design. Mumin had recently fatally shot a nonthreatening individual who would not comply with his demands. After trying and failing to escape from his apartment complex, Mumin hid in the community room with his loaded firearm. He heard numerous police officers calling around the apartment complex, as well as a police helicopter overhead. When Mackay began to open Door 1, Mumin believed the police had found his hiding place. In rapid succession, Mumin fired through the opening at Door 1 and swept over to Door 2, firing two more shots that penetrated through the closed door and struck objects some distance away. The jury could reasonably conclude, based on this evidence, that Mumin was unsure exactly where the police officer opening the door was located and intended to create a zone of fatal harm in front of both double doors, killing anyone in that zone in order to ensure that the police officer (Mackay) would be killed as well. It was the last stand of a desperate killer who had endured more than an hour in the community room listening and waiting for police to find him.

In arguing that the evidence was insufficient to instruct on the kill zone theory of liability, Mumin frames the issue as whether "the *only* reasonable inference" to be drawn from the evidence is that he intended to create a kill zone. We have already explained why this standard of review is incorrect. Mumin's contention therefore fails at the outset. (See *People v. Foss* (2007) 155 Cal.App.4th 113, 126.) Nonetheless, we will consider his arguments as if they had been made under the proper standard.

Mumin focuses on the number of shots fired, again claiming they were all fired at Door 2. We have already explained why the evidence would support a different finding. And while the number of shots fired was not

high, the type of firearm and ammunition used, as well as the surrounding circumstances, support the reasonable inference that Mumin intended to create a kill zone. His firearm was semiautomatic, and he fired his three shots rapidly in quick succession. His bullets were hollow point, which are designed to cause greater damage. They were powerful enough to penetrate a closed door and travel some distance away. Mumin rapidly sprayed bullets across the two doors, without warning and without delay, minimizing the chance that anyone on the other side could escape. Moreover, Mackay and Johnson immediately returned fire, wounding Mumin and likely persuading him that continuing the firefight was unwise. A jury could reasonably infer that the three shots fired by Mumin were not a product of his unwillingness to use greater force, but were instead limited by the officers' quick and effective response.

Mumin emphasizes the openness of the area facing the community room. Generally, an open area tends to undermine the inference that a defendant intended to create a kill zone because, among other reasons, it would be unlikely for a defendant to believe he could cover such a large area with lethal force using a conventional firearm. Here, however, Mumin's area of focus was the area behind Door 1 and Door 2. The evidence supports the reasonable inference that Mumin intended to, and did, blanket this more limited area with lethal force. It is of lesser relevance that Johnson had a more open area beside and behind him, away from the doors, since his exact position and surroundings were not known to Mumin. The limited physical space facing Mumin, and his coverage of that space with lethal force, supports the reasonable inference that Mumin intended to kill both Mackay and anyone else on the opposite side of the doors. The openness of the area facing the community room is not irrelevant, but it also does not make

unreasonable the inference that Mumin intended to create a kill zone in a subset of that area facing Door 1 and Door 2.[6]

Mumin argues that the kill zone theory is unsupported because there was no evidence Mumin knew anyone besides Mackay was on the other side of the doors. He is incorrect. The kill zone theory of liability does not require that a defendant be specifically aware of other victims within the kill zone. "Whether or not the defendant is aware that the attempted murder victims were within the zone of harm is not a defense, as long as the victims actually were within the zone of harm." (*People v. Adams* (2008) 169 Cal.App.4th 1009, 1023.) Instead, the focus remains on the defendant's intent. A defendant's awareness of potential victims is relevant to that intent, but it is not dispositive. (*Cerda*, *supra*, 45 Cal.App.5th at p. 20, review granted.) Here, based on the evidence of extensive police activity at the complex, it would be reasonable to infer that Mumin was aware that the police officer opening the door was unlikely to be alone. But even if Mumin could not be sure that another officer was with Mackay, the evidence supports the reasonable inference that Mumin intended to kill anyone who ended up being behind Door 1 and Door 2 in order to ensure Mackay was also killed. This inference is sufficient to support the kill zone theory of liability.

The kill zone theory additionally requires evidence that the victim who was not the primary target was located within the zone of fatal harm.

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6 Similarly, Mumin notes that no one was injured by the three shots he fired. This fact is relevant but not dispositive. The sufficiency of the evidence supporting a kill zone instruction "does not turn on the effectiveness or ineffectiveness of the defendant's chosen method of attack." (*Canizales*, *supra*, 7 Cal.5th at p. 611.) The circumstances of the shooting support a reasonable inference that Mumin harbored the requisite intent, notwithstanding the lack of injury, for the reasons we have already discussed.

(*Canizales*, *supra*, 7 Cal.5th at p. 610.) "[T]he jury is to consider the circumstances of the attack, including the type and extent of force used during the attack, to determine the scope of that zone and whether the alleged victim was within the zone." (*Id*. at p. 612.) Here, based on the firearm and ammunition used, the number of shots, the trajectory of Mumin's bullets, and the distance they travelled, a jury could reasonably find that the zone of fatal harm encompassed the area in front of Door 1 and Door 2, from the doors themselves to somewhere behind where Johnson was standing. When Mackay opened Door 1, and Mumin began shooting, Johnson was standing in front of Door 2 approximately 25 feet away. Mumin specifically fired two shots through Door 2, and those two hollow-point bullets struck a trash area behind Johnson. Johnson was located in the area traversed by the bullets, and he could have been struck by them. Based on this evidence, a jury could reasonably infer that Johnson was located in the zone of fatal harm.

Mumin claims that the kill zone, if any, was only located in front of Door 1. In Mumin's view, because Johnson was standing in front of Door 2, and only moved toward Door 1 after Mumin stopped shooting, he was not located in the kill zone. Mumin's limited view of the scope of the kill zone is unwarranted. As discussed, a jury could reasonably find that the kill zone encompassed the area in front of both Door 1 and Door 2 and Johnson was located in this area.

In sum, based on the evidence, a jury could reasonably find that Mumin intended to create a zone of fatal harm around Mackay, i.e., an area in which Mumin intended to kill everyone present to ensure Mackay's death, and that Johnson was located in that zone. The evidence therefore supports an

instruction on the kill zone theory of liability under *Canizales*, and the trial court did not err by providing such an instruction to the jury.

II

Question Regarding Defense Counsel's Closing Argument

Mumin next contends the trial court committed misconduct by questioning his counsel, in the presence of at least some jurors, about her closing argument. In that argument, Mumin's counsel conceded his guilt on certain offenses stemming from the community room shooting, but she maintained he was not guilty of attempted murder. After the court excused the jury, the court asked, "And for the record, this approach on the argument has been discussed with your client?" Mumin's counsel started to respond, and the court said, "Approach that you just made." Mumin's counsel responded, "I would wait till everyone is out of the room." The court said, "So the answer is yes?" Mumin's counsel answered, "Yes." The transcript does not reflect whether there were any pauses or delays between the statements. After a break, outside the presence of the jury, the court continued to discuss whether Mumin objected to his counsel's approach. (See *McCoy v. Louisiana* (2018) 584 U.S. __ [138 S.Ct. 1500, 1510] ["[C]ounsel may not admit her client's guilt of a charged crime over the client's intransigent objection to that admission."].)

"Although the trial court has both the duty and the discretion to control the conduct of the trial [citation], the court 'commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution.' " (*People v. Snow* (2003) 30 Cal.4th 43, 78 (*Snow*).) " 'When "the trial court persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which

the jury may plainly perceive that the testimony of the witnesses is not believed by the judge . . . it has transcended so far beyond the pale of judicial fairness as to render a new trial necessary." ' [Citation.] But a defendant seeking relief on such a theory must establish prejudice. ' "[O]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." ' [Citation.] We make that determination on a case-by-case basis, examining the context of the court's comments and the circumstances under which they occurred. [Citation.] Thus, the propriety and prejudicial effect of a particular comment are judged by both its content and the circumstances surrounding it." (*People v. Abel* (2012) 53 Cal.4th 891, 914 (*Abel*).)

As an initial matter, we conclude Mumin forfeited his claim of error by failing to object to the court's question. "[A] defendant who fails to make a timely objection to the claimed misconduct forfeits the claim unless it appears an objection or admonition could not have cured any resulting prejudice or that objecting would have been futile." (*Abel*, *supra*, 53 Cal.4th at p. 914.) Mumin contends his counsel's request to discuss her approach outside the presence of the jury was sufficient. We disagree because her request did not inform the court that she believed the court had committed misconduct. Mumin asserts "[i]t would have been futile, if not dangerous, to push any further" in front of the jury. But Mumin's counsel could have objected *outside* the presence of the jury. "[T]he circumstances in no way suggest an objection and a request to have the jury admonished would have found an unsympathetic jurist." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1320 (*Seumanu*).)

Even considering Mumin's contention on the merits, and assuming without deciding that the trial court's question was misconduct, Mumin has not shown prejudice. It is unlikely a lay jury understood that the trial court's question was unusual in any way. On its face, the question does not imply any criticism of the argument. The court merely asked if Mumin's counsel had discussed her approach with Mumin. (See *Snow*, *supra*, 30 Cal.4th at p. 79 ["In asking defense counsel whether a line of questioning . . . was within the scope of redirect, the court neither disparaged counsel's efforts nor prevented counsel from pursuing cross-examination."].) The question was also one isolated incident of alleged misconduct. Mumin has not shown it deprived him of a fair trial or had any effect on the jury's verdict. (See *Seumanu*, *supra*, 61 Cal.4th at p. 1321 ["the trial court's single, brief comment could not possibly have been prejudicial"]; see also *Abel*, *supra*, 53 Cal.4th at p. 914; *Snow*, at pp. 81-82.)

Mumin also has not shown he was deprived of his right to effective assistance of counsel. He relies on *People v. Diggs* (1986) 177 Cal.App.3d 958, 970, where defense counsel in closing argument "effectively withdrew a crucial defense and admitted his client's guilt without his client's consent." Mumin raises no similar error. His focus is solely on the court's question, which was not prejudicial misconduct for the reasons already discussed.

III

Lesser Included Offenses

Mumin contends his convictions for assault with a semiautomatic firearm (§ 245, subd. (b)) should be vacated because they are lesser included offenses of assault on a peace officer with a semiautomatic firearm (*id.*, subd. (d)(2)). The Attorney General concedes he could not be convicted of both sets of offenses. We agree as well.

"In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." [Citations.]' [Citation.] Section 954 generally permits multiple conviction. Section 654 is its counterpart concerning punishment. It prohibits multiple punishment for the same 'act or omission.' When section 954 permits multiple conviction, but section 654 prohibits multiple punishment, the trial court must stay execution of sentence on the convictions for which multiple punishment is prohibited." (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227.) "A judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' [Citation.] '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' " (*Id.* at p. 1227.)

"To ascertain whether one crime is necessarily included in another, courts may look either to the accusatory pleading or the statutory elements of the crimes. When, as here, the accusatory pleading incorporates the statutory definition of the charged offense without referring to the particular facts, a reviewing court must rely on the statutory elements to determine if there is a lesser included offense. [Citations.] 'The elements test is satisfied if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, such that all legal elements of the lesser offense are also elements of the greater. [Citation.] In other words, " '[i]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.' " ' [Citation.] Nevertheless, if the *same* evidence is required to support *all*

elements of both offenses, there is no lesser included offense. [Citation.] Each is its own offense, based on different statutes that apply to the same conduct; neither can be said to be a lesser of the other." (*People v. Robinson* (2016) 63 Cal.4th 200, 207.)

Here, as the parties agree, the greater offense of assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2)) includes all of the statutory elements of the lesser offense of assault with a semiautomatic firearm (*id.*, subd. (b))—plus the additional element that the assault must be upon the person of a peace officer, who the defendant knows or reasonably should know is a peace officer engaged in the performance of his or her duties, and who is engaged in the performance of his or her duties (*id.*, subd. (d)(2)). Mumin therefore could not be convicted of both sets of assault offenses. His convictions on the lesser included offenses must be vacated. (See *People v. Vela* (2012) 205 Cal.App.4th 942, 945; *People v. Oldham* (2000) 81 Cal.App.4th 1, 16.) Because the court stayed the sentences for those convictions under section 654, our disposition does not affect Mumin's sentence and remand for resentencing is unnecessary. (See *People v. Espinoza* (2002) 95 Cal.App.4th 1287, 1321-1322.)

DISPOSITION

The judgment is modified to vacate Mumin's convictions for assault with a semiautomatic firearm, the attached enhancements, and the stayed sentences thereon. As so modified, the judgment is affirmed. The trial court

is directed to prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

GUERRERO, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.

KEVIN J. LANE, Clerk of the Court of Appeal, Fourth Appellate District, State of California, does hereby Certify that the preceding is a true and correct copy of the Original of this document/order/opinion filed in this Court, as shown by the records of my office.

WITNESS, my hand and the Seal of this Court.

08/19/2021

KEVIN J. LANE, CLERK

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Deputy Clerk

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Raymond Mark DiGuiseppe

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