S221958

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

MICHAEL RAFAEL CANIZALES, et al.,

Defendants and Appellants.

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

APPELLANT WINDFIELD'S OPENING BRIEF ON THE MERITS

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QUESTION PRESENTED

This Court granted review on the following issue: Was the jury properly instructed on the "kill zone" theory of attempted murder?

STATEMENT OF THE CASE

A jury convicted appellant KeAndre Dion Windfield of the first degree murder of Leica Cooksey (Count 1, Pen. Code, § 187, subd. (a)) and the attempted, premeditated murder of Travion Bolden (Count 2, Pen. Code, §§ 664/187, subd. (a)) and Denzel Pride (Count 3). The jury found as to Count 1 that Windfield personally and intentionally discharged a firearm causing death to Cooksey (Pen. Code, § 12022.53, subd. (d)), found as to Counts 2 and 3 that Windfield personally and intentionally discharged a firearm (Pen. Code, § 12022.53, subd. (c)), and found as to Counts 1, 2, and 3 that the offense was committed for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)). (1 CT 139-143; 2 CT 274-284; Supp. CT 66-67.)

The court sentenced Windfield to a total indeterminate term of 120 years to life. (Supp. CT 121-123; Sentencing RT 50-51, 54.)

The Court of Appeal affirmed the judgment as to Windfield with directions not relevant to the question presented in an opinion filed on March 5, 2014 and a superseding opinion filed on September 10, 2014 (the Opinion) and partially published (*People v. Canizales et al.* (2014) 229 Cal.App.4th 820, 832). This Court granted review on the question presented on November 19, 2014.

STATEMENT OF FACTS

This case arises out of five shots fired into a crowd of people on the

evening of Friday, July 18, 2008. Events earlier that day are not relevant to the question presented, so appellant states them briefly:

Denzell Pride lived in the 300 block and his friend Travion Bolden lived in the 200 block of West Jackson Street in Rialto. (1 RT 153; 3 RT 574-575.) They were members of Hustla Squad, a criminal street gang. (3 RT 672-673.) Canizales and Windfield lived on or near Ramona Street in Rialto. (2 RT 475.) They were members of Ramona Blocc, another criminal street gang. (2 RT 483, 487.) Hustla Squad and Ramona Blocc were rivals; a detective testified that shootings between the gangs were common. (2 RT 511-512.)

On the afternoon on July 18, Bolden, Pride, and Canizales all happened to be at a Taco Bell near West Jackson at the same time. Canizales was with a female. Bolden thought she was trying to stir something up between Pride and Canizales, although nothing overt happened. (2 CT 479-481.)

Later in the afternoon, Bolden and several females were standing outside at the intersection of West Jackson and Willow Avenue when Canizales walked by with a little boy. (2 CT 482; 1 RT 153, 159-162.) Some words were exchanged between Bolden and Canizales. Again, Bolden thought one of the females was trying to provoke something, although nothing overt happened. (1 RT 162-165, 169.) Canizales and the boy continued to their destination, a grocery store. (2 CT 482.)

Bolden felt he had been disrespected. (1 RT 168.) He ran to Pride's apartment to tell him what had just happened with Canizales. Pride started to run after Canizales, but his mother stopped him. (2 CT 483; 1 RT 174-175; 2 RT 294-296.)

When Canizales reached the grocery store, he sent the little boy to get Windfield. (3 RT 741-742.)

Around 8:40 PM, numerous people were out on the street on the 300

block of West Jackson when Windfield fired five shots into the crowd. The facts of this incident are critical to the question presented, so appellant states them in detail:

The 300 block of West Jackson is a cul de sac lined with apartment buildings. It runs east-west from its intersection with Willow at the east end to a park at the west end. (Exhibit 55; 1 RT 112, 181.) Denzell Pride's apartment building, 330 West Jackson, is on the north side of the street approximately halfway down the block. (Exhibit 55; 3 RT 574-575.) The street is wide enough that, with cars parked on both sides of the street, there is room for two or even three cars to pass between the parked cars. (Exhibit 76.) The apartments are set back from the street, and the street is bordered with curbs, grass medians, sidewalks, and lawns between the sidewalks and the apartment buildings. (Exhibit 8.) From Willow to around Pride's building, there are wrought iron fences at the far edges of the sidewalks. (Exhibits 8, 13, 15.)

A defense investigator used a rolatape to measure the length of the street from Willow to the park and found it to be 352 feet. (Exhibit 76, letter dated 4-22-11, paragraph 4.) On that basis, visual comparison of distances on an aerial photo of the block indicates the width from the apartments on one side to those on the other side is approximately 125 feet. (See Exhibits 55, 76.) Thus, the open area of the block is a little longer and a little narrower than a 300 x 160 foot football field.

July 18th was a hot summer evening. (1 RT 112.) People were out on the street and sidewalks. Although Ramona Jones, a friend of the victim Leica Cooksey, testified that there were not a lot of people outside (2 RT 400), Tracy Wright, Bolden's mother, testified there were "quite a few people," a "little more than ten people." (1 RT 108.) They were "[p]retty much scattered" around the block. (*Ibid.*) There were "people on one side and people on the other side." (*Ibid.*) "Some [were] on the sidewalks and

some on the street." (*Ibid.*) They were "[l]aughing, talking, dancing in the street." (1 RT 109.) Denzell Pride testified that there was a "crowd of people" in the street, "partying and dancing." (3 RT 554.) Bolden testified, "It was a lot of people because they were getting ready for a block party." (1 RT 181.) He said residents of Pride's apartment building were setting up tents with food and beverages. (1 RT 182-183.) There were "30 people, probably more than that." (1 RT 182.) "Some [were] in the middle of the street; some at the party; some at the end of the cul de sac. .... The whole block full of people." (1 RT 181.)

Bolden testified that, when the shots were fired, he was in the street on the south side near where the color of the wrought iron fence changes from white to black. (Exhibit 8 [black dot marks the spot]; Exhibit 15 [fence across street from Bolden's apartment changes color]; 1 RT 186, 242, 246-247, 288-289, 311; see 2 CT 487-488 [in interview, Bolden says he was by the white gate, not the black gate (see Exhibit 15)].)

Bolden testified that Pride was standing with him. (1 RT 186, 242, 246-247, 288.) But, in an interview with Detective Williams, apparently in late 2009 (see 3 RT 746-747), Bolden said Pride was about four car lengths away from him. (2 CT 487-489.) Pride testified that he was standing on the sidewalk in front of his building, where he wrote "me' on Exhibit 55. (3 RT 578-579.)

Leica Cooksey was standing with several friends by her car, which was parked outside 329 West Jackson, across the street from Pride's apartment building. (2 RT 399-401; 3 RT 751.)

Suddenly, a car parked on Willow. (2 CT 485; 1 RT 188-189.) Windfield, Canizales, and several other Ramona Blocc members got out and lined up shoulder to shoulder across West Jackson, facing down the 300 block, with Windfield on the south side. (2 CT 493; 1 RT 99, 200, 213, 244.) The chronology of the ensuing events is uncertain. At some

point, Windfield yelled, "That's the little nigga!" (2 CT 486-489, 494; 1 RT 206; 3 RT 751, 753.) He took a gun from his pants. He handed it to Canizales and told him to shoot, but Canizales either did not take it or did not shoot. Appellant took the gun back and shot. (2 CT 486, 490-491, 504-506; 1 RT 205-208.)

In his interview with Detective Williams, Bolden said that, after Windfield and his companions lined up across West Jackson, Pride "gave it away" by running, and that is when the shooting began. (2 CT 488.) In his testimony, however, Bolden said that shots were fired first and the running was a response to the shots. (1 RT 190, 194.) He said Pride grabbed him and they ran down West Jackson towards the park. (1 RT 190, 191, 195.) Bolden ran in a straight line and went to the north side of the street, but Pride did some "zig-zag stuff." Bolden ran all the way to the park; he did not know where Pride went. (1 RT 195, 196, 247.) Pride testified, however, that he was standing in front of his apartment when shots were fired, and he grabbed his young nieces and took them inside his apartment. (3 RT 554-556, 580, 581.)

Windfield was standing near a manhole cover on Willow when he fired. Bolden drew a line on Exhibit 12 to show where Windfield stood. (1 RT 228-229; see Exhibit 6.) Witnesses described Windfield using a handgun. (2 CT 491, 493; 2 CT 504 [Bolden saw Windfield pull the weapon from his pants]; 1 RT 122-123 [Tracy Wright describes how Windfield held gun when he fired]; 1 RT 208-210, 245-246.) The gun was a semiautomatic, because it ejected casings. Five casings were found near the northwest corner of Jackson and Willow, and they were all nine millimeter and fired from the same gun. They were the only casings found. (3 RT 719-720.)

Windfield was a considerable distance from Denzell Pride when he shot. Regardless of whether Bolden or Pride's testimony about where Pride

was at the time of the shooting is credited, Pride was near the front of his apartment building at 330 West Jackson. A detective estimated the distance from Willow to 329 West Jackson, the building opposite Pride's building, as approximately 100 feet (3 RT 715, 722), but a defense investigator used a rolatape to measure the distance from the manhole cover on Willow to 329 West Jackson and found it to be 160 feet (Exhibit 76, letter dated 4-2-11, paragraph 1).

Bolden described wild, unfocused shooting. In his interview with Detective Williams, Bolden said Windfield could not control the gun. (2 CT 490, 491.) He testified that Windfield's shooting "was going everywhere. You could see the little sparks. It just going everywhere. You could hear it tingling everywhere. It's going everywhere but our direction." (1 RT 213.)

Of the five shots fired, one hit Leica Cooksey, killing her. (1 RT 136, 138; 2 RT 401.) A nine millimeter round was recovered from her body. (3 RT 762-763.) There was no evidence that any other spent bullet was found. Bolden told Detective Williams "the bullet was hittin' the gates where we were at." (2 CT 491.) He testified he heard "tingling through the gates." (1 RT 192.) There is no other evidence of where Windfield's shots went.

When Windfield stopped shooting, he and the other Ramona Blocc members fled down Willow. There is no evidence that anything prevented him from firing further shots had he wished to do so. (2 CT 493-494; 1 RT 102-103.) Someone made a 911 at 8:41 PM. (3 RT 715, 763.)

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

I. THE INSTRUCTION SHOULD NOT HAVE BEEN GIVEN, BECAUSE IT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Introduction.

The court instructed the jury on attempted murder using CALCRIM No. 600. (1 CT 233.) The instruction given is set forth in Appendix A to this brief. The instruction included the kill zone instruction that is the focus of the question presented.

The instruction was error, because there was no evidence to support it. The kill zone theory requires evidence that supports the inference defendant *intended to kill everyone* in a zone. (*People v. Smith* (2005) 37 Cal.4th 733, 745-746 (*Smith*).) Windfield's five shots do not support the inference he intended to kill everyone in any zone. He *endangered* everyone on the block, but the kill zone theory does not apply to mere endangerment. (*People v. McCloud* (2012) 211 Cal.App.4th 788, 798 (*McCloud*); see *People v. Perez* (2010) 50 Cal.4th 222, 224 (*Perez*) ["shooting at a person or persons and thereby endangering their lives does not itself establish the requisite intent for the crime of attempted murder."].) The kill zone theory addresses the element of specific intent, and endangerment supports an inference of conscious disregard and implied malice (*People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1205) but not specific intent as required in attempted murder. (*People v. Perez, supra,* 50 Cal.4th at 232.) If the kill zone theory were applied so that defendant could be convicted of the attempted murder of a person because defendant merely endangered that person, the result would be conviction of attempted murder with the mental element of implied malice, which is contrary to law.

(*People v. Smith, supra,* 37 Cal.4th at 739; *People v. Mize* (1889) 80 Cal. 41, 43.)

Because Windfield's five shots do not support the inference he intended to kill everyone in any zone, there was insufficient evidence to support instruction on the kill zone theory. The Opinion's contrary conclusion is mainly attributable to the erroneous premise that the kill zone theory can be applied to evidence that shows no more than endangerment of the victim.

B. The kill zone theory applies when the defendant uses force that makes it reasonable to infer he specifically intended to kill everyone in a zone occupied by the victim.

The kill zone theory is a way to find the element of specific intent in attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 330 (*Bland*).) It holds, first, that certain uses of force by the defendant support the inference he specifically intended to kill everyone in an area. This Court has often referred to the nature and scope of the force as the basis for the inference. In *Bland*, this Court stated, "Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone." (*Id.* at 330, quoting *Ford v. State*, *supra*, 625 A.2d at pp. 1000-1001, fn. omitted.) This Court approved the reasoning of the court in *People v. Vang* (2001) 87 Cal.App.4th 554 (*Vang*): "The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up...." (*Id.* at 563-564, quoted in *People v. Bland, supra,* 28 Cal.4th at 330.) In *Perez*, this Court acknowledged that "*Bland's* kill zone theory of multiple attempted

murder is necessarily defined by the nature and scope of the attack." (*People v. Perez, supra,* 50 Cal.4th at 232.)

The kill zone theory holds, second, that if the defendant specifically intended to kill everyone in an area, he specifically intended to kill any particular person who happened to be in the area, such that he may be convicted of the attempted murder of that person. "[T]he defendant may be convicted of the attempted murders of any within the kill zone ..." (*People v. Bland, supra,* 28 Cal.4th at 331.) *"Bland* simply recognizes that a shooter may be convicted of *multiple counts* of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area ...." (*People v. Smith, supra,* 37 Cal.4th at 745-746, italics added.)

Kill zone reasoning demands evidence that the defendant specifically intended to kill *everyone* in a given area. In *Perez*, this Court gave as examples of creating a kill zone "using an explosive device with intent to kill *everyone* in the area of the blast, or spraying a crowd with automatic weapon fire, a means likewise calculated to kill *everyone* fired upon." (*People v. Perez, supra,* 50 Cal.4th at 232, italics added.) In *Smith*, this Court stated, "A defendant creates a kill zone when he or she uses lethal force designed and intended to kill *everyone* in an area around a primary target." (*People v. Smith, supra,* 37 Cal.4th at 746, italics added.)

The intent to kill everyone in an area is important, because only from that premise is it logical and reasonable to infer that, if the victim happened to be within the area, the defendant specifically intended to kill the victim. This Court has recognized the syllogistic nature of kill zone reasoning. In *Bland*, this Court approved the reasoning of the court in *Vang*: "defendants harbored a specific intent to kill every living being within the residences they shot up.... The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims

who were present and in harm's way, but fortuitously were not killed." (*People v. Bland* (2002) 28 Cal.4th 313, 330.), quoting *People v. Vang, supra,* 87 Cal.App.4th at 563-564.) The court in *People v. Adams* (2008) 169 Cal.App.4th 1009 (*Adams*) approved the same reasoning: "(1) Adams had the express intent to kill Soult by intentionally creating a zone of harm or kill zone ... and (2) Lopes, J.V., and Marr were within that zone of harm," therefore, Adams had the necessary express malice for attempted murder of Lopes, J.V., and Marr. (*Id.* at 1023.) *McCloud* describes the reasoning as follows: "In a kill zone case, the defendant ... *specifically intends* that *everyone* in the kill zone die. If some of those individuals manage to survive the attack, then the defendant—having specifically intended to kill every single one of them and having committed a direct but ineffectual act toward accomplishing that result—can be convicted of their attempted murder." (*People v. McCloud, supra*, 211 Cal.App.4th at 798, italics in original.)

The kind of force that this Court and other courts have found sufficient to support an inference the defendant specifically intended to kill everyone in an area is force so devastating under the circumstances that it is a near certainty everyone in the area will die. This Court and other courts have held that specific intent to kill everyone in a zone could reasonably be found if a person placed a bomb on a commercial airplane and so ensured the death of all the passengers (*People v. Bland, supra,* 28 Cal.4th at 329-330.); if a defendant drove by a group of persons and attacked the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group (*id.* at 330); where the defendant or defendants fired numerous shots at short range at an automobile passenger compartment occupied by several persons (*id.* at 330–331; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1233); where the defendants sprayed a duplex with over 50 shots from multiple assault rifles firing wall-

piercing ammunition (*People v. Vang* (2001) 87 Cal.App.4th 554, 558, 564, cited in *People v. Bland, supra,* 28 Cal.4th at 330); where the defendant lit fires at the front and back doors of a house to burn down the house and prevent escape (*People v. Adams, supra,* 169 Cal.App.4th at 1012); and where the defendant fired multiple shots at people in a doorway (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1391). In all of these cases, the circumstances defined a zone, and the defendant used force sufficient to kill everyone in the zone.

C. The force used by Windfield does not support the inference he intended to kill everyone in any zone.

The evidence concerning the nature and scope of the force used by Windfield is described in detail in the Statement of Facts. It shows that Windfield fired five shots from a semi-automatic handgun at a moving target 100 or more feet away. He did this on an area of a residential street that was not much smaller than a football field and was occupied by many more than five people, possibly more than 30. Although numerous, the occupants of the block were not standing in a group or constrained by any physical structure other than widely spaced fences and apartment buildings. One of Windfield's shots hit the unintended victim, and it appears from Bolden's testimony that one or more of the shots hit the wrought-iron fence near which Bolden was standing. There is no other evidence of where Windfield's shots went.

Windfield's shooting is nothing like the assaults described above. Rather than exploding a bomb on a plane, or spraying an enclosed group with a flurry of shots, he fired five shots into an open area occupied by from 10 to 30 or more people. He could not rationally have intended to kill them all, because the force he used was so plainly inadequate for that purpose. The evidence does not suggest any zone smaller than the entire

block. The jury found that Windfield meant to kill Pride (2 CT 281), but Pride was not standing in any group like the one postulated in Bland. His movement was not constrained by any physical object such as an airplane interior (*People v. Bland, supra,* 28 Cal.4th at 330), an automobile passenger compartment (*ibid*; *People v. Campos, supra,* 156 Cal.App.4th at 1233), or a doorway (*People v. Bragg, supra,* 161 Cal.App.4th at 1391). The evidence does not suggest that Windfield intended to kill everyone within a certain distance of Pride, and, on the record here, any attempt to define such a distance would be entirely arbitrary.

Courts confronting similar facts have found it was not reasonable to infer that the defendant created a kill zone. In *People v. McCloud, supra*, 211 Cal.App.4th 788, defendant Stringer stood in the parking lot of a Masonic lodge hosting a party at which hundreds of people were packed "elbow to elbow" inside and many more were in line in the parking lot, waiting to enter. He fired 10 shots from a semiautomatic handgun at the lodge. Three bullets went through a window and struck three victims inside, killing two and injuring the third. The seven remaining bullets hit no one. The trial court instructed the jury on the kill zone theory of attempted murder, and Stringer was convicted of 46 counts of attempted murder in addition to two counts of murder. (*Id.* at 791-794.) The Second Appellate District, Division One held that the trial court prejudicially erred by instructing the jury on the kill zone theory of attempted murder, because the record contained no evidence to support application of the kill zone theory. (*Id.* at 791.) "The evidence of the size and density of the crowd ... does not constitute evidence that Stringer and McCloud intended to kill 46 people with 10 bullets, so it cannot support respondent's application of the kill zone theory in this case." (*Id.* at 801.) The court affirmed Stringer's two murder convictions but reversed the 46 attempted murder convictions. (*Id.* at 807.)

In *People v. Anh-Tuan Dao Pham* (2011) 192 Cal.App.4th 552, the defendant fired a gun a number of times into a group of people, intending to kill two people he mistakenly thought were present. (*Id.* at 556.) The court held he did not create a kill zone, because his firing a gun at a group of people he thought included those teenagers, by itself, did not demonstrate "a generalized intent to kill people standing in the group." "Just because a defendant fires a gun repeatedly at a group of people does not necessarily mean the defendant can be convicted of as many counts of attempted murder as the number of bullets he fired." (*Id.* at 559.)

Thus, other courts confronted with facts similar to the facts here have concluded that firing shots into a group does not make it reasonable to infer the defendant specifically intended to kill everyone in the group. These cases support Windfield's contention that he did not create a kill zone. Given the evidence and authorities discussed above, there was insufficient evidence to support giving a kill zone instruction.

D. The Opinion's conclusion that the evidence was sufficient relies on the erroneous premise that kill zone theory may be applied to evidence that the defendant merely endangered the victim.

The Opinion rejects the arguments made above. It concludes that there was substantial evidence to support the kill zone instruction (Opn., pp. 27-30) and that "it was for the jury to make the decision whether Windfield created a kill zone when he fired and whether Bolden was in it." (Opn., pp. 28, 29.) As appellant will discuss, these conclusions are incorrect, because they rest on flawed premises.

1. The Opinion approves giving a kill zone instruction on the basis of evidence that shows no more than endangerment.

McCloud concluded that "the kill zone theory ... does not apply if

the evidence shows only that the defendant intended to kill a particular targeted individual but attacked that individual in a manner that subjected other nearby individuals to a risk of fatal injury." (*People v. McCloud*, *supra*, 211 Cal.App.4th at 798, italics omitted.) The Opinion **rejects** this conclusion. (Opn., p. 23.) It holds that it is "restrictive" (Opn., p. 24) and "goes too far" (Opn., p. 23). The Opinion rejects appellant's suggestion that the existence of a kill zone "requires a defined area that can be saturated with the kind of lethal force the defendant chooses to use," saying it is not supported by authority. (Opn., p. 28.)

As support for the instruction, the Opinion points to evidence that five bullets were fired. It says the jury could infer that Windfield used "a means to kill Pride that inevitably would result in the death of other victims within the zone of danger." (Opn., p. 27.) It implies that "firing five bullets into a crowd of people" is a reasonable basis for an inference that "the defendants intended that all of those people be killed." (Opn., p. 29.)

These assertions are incorrect. Whether or not it was "inevitable" that *someone* would die, it was not inevitable or even possible that *everyone* on the block would die. "All of those people" cannot mean all of the people on the block: on even the most conservative estimate of the size of the crowd, five shots were not nearly enough to kill everyone there. The Opinion does not suggest any smaller area.

It appears that the Opinion holds that the evidence supports the instruction because Windfield's five shots endangered the lives of everyone on the block. But, as appellant will discuss, evidence of mere endangerment does not support the kill zone instruction.

2. Endangerment does not make it reasonable to infer specific intent to kill.

Windfield did endanger the lives of everyone on the block. He

committed serious crimes, including assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)). (*People v. Trujillo* (2010) 181 Cal.App.4th 1344, 1355.) Such crimes could be enhanced for firearm use and gang activity. (Pen. Code, §§ 186.22, subd. (b)(1)(C), 12022.5; see 2 CT 279-280.) The aggregate sentence for a single count could be as much as nine years for the assault plus 10 years consecutive for the firearm enhancement plus 10 years consecutive for the gang enhancement, a total of 29 years. Windfield could have been convicted of multiple counts. The prosecutor made the tactical choice not to charge Windfield with assault and enhancements instead of or in addition to the charge of attempted murder, but it is not as if the instruction here must be upheld or criminals will go unpunished.

Firing five shots into a crowd is an act the natural and probable consequences of which are dangerous to human life. The jury could find that Windfield acted willfully and with conscious disregard for human life. The situation is similar to that in *People v. Sarun Chun, supra,* 45 Cal.4th 1172, in which the defendants fired three guns into the passenger compartment of a car (*id.* at 1179), and this Court remarked that "[n]o juror could have found that defendant participated in this shooting ... without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life ..." (*id.* at 1205). Conscious disregard supports a finding of implied malice. But "[a]ttempted murder requires the specific intent to kill ...." (*People v. Smith, supra,* 37 Cal.4th at 739, interior quotation marks omitted.) Implied malice does not suffice. (*Ibid.*; *People v. Perez, supra,* 50 Cal.4th at 229-230; *People v. Lee* (2003) 31 Cal.4th 613, 623; *People v. Swain* (1996) 12 Cal.4th 593, 604–605; *People v. Mize, supra*, 80 Cal. at 43.)

Evidence of implied malice does not support an inference of specific intent. Specific intent to unlawfully kill and express malice are, in essence,