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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN JOSEPH KAULICK,

Defendant and Appellant.

B265040

Los Angeles County
Super. Ct. No. PA034177

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Reversed and remanded with directions.

Marilee Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Steven Joseph Kaulick appeals from the trial court's order denying his petition for resentencing of his three-strikes sentence (Pen. Code,¹ § 1170.126, enacted as part of the Three Strikes Reform Act (Proposition 36).) The court concluded Kaulick was ineligible for resentencing, finding by a preponderance of the evidence that he intended to commit great bodily injury during his third-strike offense. Kaulick raises two contentions on appeal: (1) the court violated his Sixth Amendment right to a jury trial by making a factual finding that he intended to commit great bodily injury during his third-strike offense, a finding which rendered him ineligible for resentencing; and (2) the court applied the incorrect standard of proof in making its eligibility determination. We reject Kaulick's first contention but agree with his second. Accordingly, we reverse the court's order denying Kaulick's Proposition 36 petition and remand for a new hearing to determine whether Kaulick is eligible for resentencing under a beyond a reasonable doubt standard of proof.²

FACTUAL AND PROCEDURAL BACKGROUND

1. The underlying offense

In September 1999, Kaulick attacked his 18-year-old neighbor (victim). The victim was outside Kaulick's apartment when she heard him screaming at someone over the telephone.

¹ All undesignated statutory references are to the Penal Code.

² Kaulick also filed a petition for writ of habeas corpus (B270914, March 16, 2016). We ordered that writ petition to be considered at the same time as this appeal. We have denied Kaulick's writ petition in a separate order.

When the victim asked Kaulick if he was okay, he told her that he was getting a divorce and moving out of his apartment. The victim then offered to help Kaulick move.

After the victim entered Kaulick's apartment, Kaulick grabbed her, tore her blouse, and placed his hand over her mouth. Kaulick then began choking the victim and telling her to "shut up." As the victim struggled to leave the apartment, Kaulick grabbed her by her hair, started choking her again, and told her that he would kill her.

Kaulick then dragged the victim across the room to his bed, threw her on it, and straddled her. As Kaulick held the victim down and began taking off his belt, the victim kicked him in his crotch, fled the apartment, and called the police.

The officer who examined the victim after the attack observed that she had redness on both sides of her neck and a scratch mark or handprint on her left arm. The victim described her injuries as "[n]othing but scratches and red marks."

The People charged Kaulick with false imprisonment by violence (§ 236, count 1), assault with intent to commit rape (§ 220, count 2), and making criminal threats (§ 422, count 3). (*People v. Superior Court (Kaulick)* 215 Cal.App.4th 1279, 1287 (*Kaulick*)). The People alleged Kaulick had suffered two prior convictions for kidnapping, both of which are serious or violent felonies under the Three Strikes law (§§ 667.5 & 1170.12). (*Ibid.*) The People further alleged one prior strike (§ 667, subd. (a)(1)) and two prior prison term enhancement allegations (§ 667.5, subd. (b)). (*Ibid.*)

In 2000, a jury convicted Kaulick of false imprisonment by violence. (*Kaulick, supra*, 215 Cal.App.4th at p. 1287.) The jury did not, however, reach verdicts as to the assault and criminal threats charges, and the court declared a mistrial as to those counts. (*Id.* at pp. 1287-1288.) At a bifurcated bench trial, the

court found true the prior conviction and prison term allegations. (*Id.* at p. 1288.)

The court sentenced Kaulick to a term of 25 years to life for the false imprisonment offense under the Three Strikes law, and it imposed an additional one-year term for the prison prior enhancement. (*Kaulick, supra*, 215 Cal.App.4th at p. 1287.) After pronouncing sentence, the court dismissed counts 2 and 3. (*Ibid.*)

2. Proposition 36 proceedings

In December 2012, Kaulick filed a petition for resentencing under Proposition 36. Kaulick served the Attorney General, but not the District Attorney, with the petition, and the trial court granted the petition without receiving opposition from the District Attorney. (*Kaulick, supra*, 215 Cal.App.4th at p. 1289.) The court resentenced Kaulick to a total term of seven years in prison, consisting of the upper term of three years for his false imprisonment conviction, doubled to six years under the Three Strikes law, plus a one-year prison prior term. (*Id.* at pp. 1290-1291.) Because Kaulick had already served more than seven years in prison, the court ordered Kaulick's immediate release. (*Id.* at p. 1291.)

In January 2013, after learning that Kaulick was scheduled to be released from prison, the District Attorney obtained an immediate stay of the trial court's order. In February 2013, the District Attorney filed in this Court a petition for writ of mandate, challenging the court's order granting Kaulick's resentencing petition without providing the District Attorney notice and an opportunity to be heard. (*Kaulick, supra*, 215 Cal.App.4th at p. 1291.) In an opinion published in April 2013, we granted the District Attorney's petition and directed the trial court to vacate its order resentencing Kaulick

under Proposition 36, and to issue a new and different order setting a hearing on the petition. (*Id.* at pp. 1306–1307.)

In September 2013, the People filed an opposition to Kaulick's request to be resentenced. The People conceded that Kaulick was eligible for resentencing based on his prior convictions but argued that Kaulick's petition should be denied because resentencing him would pose an unreasonable risk of danger to public safety. In March 2014, Kaulick filed a reply to the People's opposition.

In March 2015, the People filed a revised opposition in which they changed their stance on the issue of Kaulick's eligibility for resentencing. The People argued that Kaulick was ineligible for resentencing because he intended to commit great bodily injury during his false imprisonment offense. In May 2015, Kaulick filed a reply to the People's revised opposition. Kaulick argued the People should be estopped from arguing he is ineligible for resentencing because the People conceded nearly two years earlier in their first opposition that Kaulick was eligible for resentencing. Kaulick also argued he was eligible for resentencing because the record of conviction for his false imprisonment conviction did not support a finding that he intended to cause great bodily injury on the victim.

On May 21, 2015, the court held a hearing on Kaulick's petition and, after hearing argument from both parties, took the matter under submission. On June 2, 2015, the court issued a written statement of decision denying Kaulick's petition. The court concluded that Kaulick was ineligible for resentencing under Proposition 36, finding by a preponderance of the evidence that he intended to commit great bodily injury to the victim of his false imprisonment offense.

Kaulick filed a timely appeal.

DISCUSSION

1. Proposition 36 and the Sixth Amendment

Kaulick contends he has a Sixth Amendment right to a jury trial on the issue of eligibility for resentencing under Proposition 36. He argues the trial court violated that right when the judge reviewing his petition, and not a jury, found he was ineligible for resentencing. We disagree because the determination of eligibility for resentencing under Proposition 36 does not implicate the Sixth Amendment.

As the United States Supreme Court held in *Dillon v. United States* (2010) 560 U.S. 817, [130 S.Ct. 2683, 177 L.Ed.2d 271, 285], a defendant does not enjoy a Sixth Amendment right to have facts found by a jury beyond a reasonable doubt with respect to issues that limit the ability of the defendant to have his lawful sentence reduced. (*Id.* at pp. 828–829; see *Kaulick, supra*, 215 Cal.App.4th at p. 1304.) Thus, there is no Sixth Amendment right to a jury trial on factual issues that determine a defendant’s eligibility to have his or her sentence reduced under Proposition 36. (See *People v. Guilford* (2014) 228 Cal.App.4th 651, 663.)

Alleyne v. United States (2013) 570 U.S. __ [186 L.Ed.2d 314, 133 S.Ct. 2151] does not support Kaulick’s argument. As explained by the California Supreme Court, *Alleyne* “held that the federal Constitution’s Sixth Amendment entitles a defendant to a jury trial, with a beyond-a-reasonable-doubt standard of proof, as to ‘any fact that increases the mandatory minimum’ sentence for a crime.” (*People v. Nunez & Satele* (2013) 57 Cal.4th 1, 39, fn. 6.) The denial of a Proposition 36 resentencing petition does not increase the mandatory minimum sentence for a crime. Therefore, *Alleyne* does not require that a jury, and not a judge, make the eligibility determination for a resentencing petition filed under Proposition 36.

2. The standard of proof for a Proposition 36 eligibility determination

Kaulick contends the trial court applied the incorrect standard of proof—i.e., preponderance of the evidence instead of beyond a reasonable doubt—when it found he intended to commit great bodily injury during his false imprisonment offense. In light of our opinion in *People v. Arevalo* (2016) 244 Cal.App.4th 836, 847-853 (*Arevalo*), we agree with Kaulick’s contention and conclude the court applied the incorrect standard of proof to its eligibility determination.

2.1. Kaulick did not forfeit his challenge to the court’s application of the incorrect standard of proof

The People contend Kaulick forfeited his challenge to the court’s application of the preponderance of the evidence standard to its Proposition 36 eligibility determination. Specifically, the People point to the fact that at the May 21, 2015 hearing on Kaulick’s petition, Kaulick’s counsel framed the issue of eligibility as whether there is “evidence by a preponderance of the evidence in the record that [Kaulick], at the time of committing [the] offense, intended to cause great bodily injury.” The People contend that counsel’s statement precludes Kaulick from challenging on appeal the court’s application of the preponderance of the evidence standard to its eligibility determination. We disagree.

At the time of the hearing on Kaulick’s petition, the issue of what standard of proof applies to a trial court’s eligibility determination under Proposition 36 was (and still is) unsettled. There is a split among the appellate courts as to what standard applies, and the issue is currently before the California Supreme Court. (See *People v. Frierson* (2016) 1 Cal.App.5th 788

[preponderance of the evidence standard applies], review granted October 19, 2016, S236728; *People v. Newman* (2016) 2 Cal.App.5th 718, 728-732 [same], review granted November 22, 2016, S237491; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1040 [same]; *Arevalo, supra*, 244 Cal.App.4th at pp. 847-853 [beyond a reasonable doubt standard applies].) In addition, we acknowledge that, at the time of the hearing on Kaulick's petition, no appellate court had yet to adopt the beyond a reasonable doubt standard as the appropriate standard of proof for making an eligibility determination under Proposition 36. (See *Newman, supra*, 2 Cal.App.5th at p. 728.) In light of the foregoing, we conclude Kaulick did not forfeit his challenge to the court's application of the preponderance of the evidence standard to its eligibility determination. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.)

2.2. The court applied the incorrect standard of proof to its eligibility determination

In *Arevalo*, we held the “beyond a reasonable doubt” standard of proof applies to the trial court's factual findings at the eligibility stage of its review of a Proposition 36 resentencing petition. (*Arevalo, supra*, 244 Cal.App.4th at pp. 847-853.) We based our holding in *Arevalo* on two considerations. First, we weighed the due process concerns that are at stake when a court determines whether a defendant is eligible for resentencing. We concluded that a heightened standard of proof should apply because of “the substantial amount of prison time potentially at stake for the defendant seeking resentencing, the risk of potential error stemming from the summary and retrospective nature of the adjudication that will be made at the resentencing eligibility proceeding, and the slight countervailing governmental interest given the People's opportunity to provide new evidence at any subsequent dangerousness hearing.” (*Id.* at p. 852.)

We next looked to the California Supreme Court’s decision in *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), which explains Proposition 36 and its purpose. Specifically, we relied on the following excerpts from *Johnson*: “ ‘[T]he parallel structure of [Proposition 36’s] amendments to the sentencing provisions and [Proposition 36’s] resentencing provisions reflects an intent that sentences imposed on individuals with the same criminal history be the same, regardless of whether they are being sentenced or resentenced. Both the sentencing scheme and the resentencing scheme provide for a second-strike sentence if the current offense is not a serious or violent felony, and they set forth identical exceptions to the new sentencing rules. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C), 1170.126, subd. (e)(2), (3).)’ (*Johnson, supra*, 61 Cal.4th at p. 686, 189 Cal.Rptr.3d 794, 352 P.3d 366.) ‘*[T]he parallel structure of [Proposition 36’s] sentencing and resentencing provisions appears to contemplate identical sentences in connection with identical criminal histories, unless the trial court concludes that resentencing would pose an unreasonable risk to public safety.*’ (*Id.* at p. 687, 189 Cal.Rptr.3d 794, 352 P.3d 366, italics added.)” (*Arevalo, supra*, 244 Cal.App.4th at p. 853.) We reasoned, “[t]he court’s analysis in *Johnson* leads us to conclude that, not only must there be a heightened standard of proof for section 1170.126 resentencing eligibility determinations, but that—in order to safeguard the intended parallel structure of [Proposition 36]—the heightened standard of proof should be beyond a reasonable doubt.” (*Ibid.*)

We acknowledge a distinction between *Arevalo* and the present case. In *Arevalo*, in determining the petitioner was ineligible for resentencing under Proposition 36, the trial court found the petitioner was “armed with a firearm” during the commission of the underlying crime, a finding that contradicted the trier of facts previous acquittal of defendant on a charge of

possession of a firearm by a felon and a not true finding on an “armed with a firearm” allegation. (*Arevalo, supra*, 244 Cal.App.4th at pp. 846, 853.) By contrast, in the present case, the jury never made an explicit finding that would contradict the court’s determination that Kaulick intended to commit great bodily injury when he committed his false imprisonment offense. This distinction does not compel us, however, to depart from *Arevalo*. Based on the same considerations discussed in *Arevalo*, which we have outlined above, we conclude the beyond a reasonable doubt standard applies to a court’s determination of eligibility for resentencing under Proposition 36. The court therefore erred in applying the preponderance of the evidence standard of proof in finding Kaulick intended to cause great bodily injury when he committed his false imprisonment offense.

The People argue we should affirm the court’s order denying Kaulick’s petition because the court’s application of the incorrect standard of proof to its eligibility determination was harmless. We disagree. Even if we were to apply the less stringent harmless error test set forth in *People v. Watson* (1956) 46 Cal.2d 818, we cannot find that the court would have made the same order if it had applied the correct standard of proof.

In finding Kaulick intended to cause great bodily injury to his victim during his false imprisonment offense, the court focused on the nature of the victim’s injuries. That is, the court reasoned that in light of the fact that Kaulick caused injuries to his victim, it could be inferred that Kaulick intended to cause great bodily injury to his victim. (See *People v. Phillips* (1989) 208 Cal.App.3d 1120, 1123-1124 [where a defendant willfully commits an act that causes great bodily injury to his victim, it can be inferred from the fact that the defendant committed such act that he intended to inflict great bodily injury].)

“Great bodily injury” is defined as “a significant or substantial injury.” (§ 12022.7, subd. (f).) “This definition does not require that the victim suffer ‘ “permanent,” “prolonged,” or “protracted” disfigurement, impairment, or loss of bodily function.’ [Citation.]” (*People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755.) Generally, lacerations, bruises, or abrasions are sufficient for a finding of “great bodily injury.” (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047–1048; see e.g., *People v. Escobar* (1992) 3 Cal.4th 740, 750 [great bodily injury found where the victim suffered “extensive bruises and abrasions over [her] legs, knees, and elbows, injury to her neck and soreness in her vaginal area of such severity that it significantly impaired her ability to walk”]; *Bustos, supra*, 23 Cal.App.4th at p. 1755 [“multiple abrasions, lacerations, and contusions” from a hit to the face and struggle on the floor constituted great bodily injury]; *People v. Sanchez* (1982) 131 Cal.App.3d 718, 733 [the victim suffered multiple abrasions and lacerations on her back and neck and had serious swelling and bruising of her right eye and a markedly swollen left cheek, constituting great bodily injury]; *People v. Mixon* (1990) 225 Cal.App.3d 1471, 1489 [great bodily injury found where the victim was strangled until she nearly passed out leaving a purple line on her neck, her eyes swelled and her nose bled, she suffered a blow to her head that produced a bump, and her eyes were red and her face was bruised].)

Here, there is substantial evidence in the record to support a finding of great bodily injury based on the victim’s injuries. For example, the officer who examined the victim after the attack testified that she had redness around her neck and a scratch or handprint on one of her arms. At times, however, the victim minimized her injuries. She testified that she only had a scratch on her chin that lasted a few days, and some red marks on her

throat. The victim also refused medical treatment and did not describe suffering any prolonged pain or discomfort. In light of the conflicting evidence concerning the extent of the victim's injuries, we cannot conclude that the court would have made a finding that Kaulick intended to commit great bodily injury against the victim if the court had applied the highest, as opposed to the lowest, standard of proof to its eligibility determination.

DISPOSITION

The trial court's order denying Kaulick's resentencing petition is reversed. The matter is remanded for a new hearing to determine whether Kaulick is eligible for resentencing under a beyond a reasonable doubt standard of proof.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

STRATTON, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.