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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ALLEN MICKEY,

Defendant and Appellant.

B293785

(Los Angeles County
Super. Ct. No. PA025967)

APPEAL from a judgment of the Superior Court of
Los Angeles County, William C. Ryan, Judge. Reversed.

Michael S. Romano and Milena N. Blake for Defendant
and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters,
Assistant Attorney General, Steven D. Matthews, and Rama R.
Maline, Deputy Attorneys General, for Plaintiff and Respondent.

In 1997 a jury convicted defendant James Allen Mickey of evading a police officer by driving a vehicle with willful and wanton disregard for the safety of others (Veh. Code, § 2800.2, subd. (a); count 1) and possession of a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a); count 2). The court sentenced him under the “Three Strikes” law to two 25-years-to-life terms, to be served concurrently.

In 2013, defendant filed a petition for recall of his sentence under the Three Strikes Reform Act of 2012 (Proposition 36). (Pen. Code, § 1170.126).¹ After a hearing, the court found that Mickey was ineligible for relief because he was armed with a deadly weapon—the car he was driving—during the commission of count one. Mickey appealed. We agree with Mickey that the evidence is insufficient to support the court’s deadly weapon finding, and therefore reverse.

FACTUAL AND PROCEDURAL SUMMARY

A. Mickey’s 1997 Convictions

On January 29, 1997, at about 11:30 a.m., Officer Michael Ryan was driving a marked patrol car when he saw Mickey, driving a Chrysler LHS, enter the parking lot of a strip mall and drive north through the lot at a high speed. Officer Ryan followed Mickey to the northeast corner of the lot. Mickey made eye contact with Officer Ryan and, after two women got out of the car, accelerated and drove out of the parking lot and onto an adjacent street at a high speed. Officer Ryan followed.

Mickey turned onto a residential street, where the speed limit was 25 miles per hour, and drove at speeds of 45 to 50 miles per hour. Officer Ryan activated his vehicle’s emergency lights, after which Mickey drove through a four-way stop intersection without

¹ Unspecified statutory references are to the Penal Code.

braking or slowing down. A school and a park are located about three blocks east of the intersection, which, according to Officer Ryan, “really increases the amount of pedestrian flow in this area.” Pedestrians were present “on either side of the street.”

Officer Ryan activated his siren. Mickey, without slowing down, drove through another four-way stop intersection adjacent to the park and school. Mickey then attempted unsuccessfully to make a U-turn by using his brakes to spin his car. After Mickey’s car came to rest, Officer Ryan stopped the patrol car in the intersection. The two cars then faced each other about six feet apart. Mickey looked at the officer and accelerated toward the patrol car. He struck the front end of the patrol car, then traveled over a curb and collided with a brick wall. Pedestrians were “in this area” at the time.

Mickey then drove away rapidly, with Officer Ryan in pursuit, and drove through another four-way stop intersection. He then made two left turns in quick succession, stopped his car, got out, and ran. He was apprehended a short time later in possession of four bags of methamphetamine. More methamphetamine was found in the Chrysler.

Mickey was charged with evading a police officer with willful and wanton disregard for the safety of persons and property (Veh. Code, § 2800.2, subd. (a); count 1), felony possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a); count 2), and assault on a police officer by means likely to produce great bodily injury (§ 245, subd. (c); count 3). A jury convicted him of the first two counts and acquitted him of count 3 and the lesser included offense of simple assault on a peace officer (former § 241,

subd. (b).)² In a bifurcated trial, the court found true allegations that Mickey had committed 12 strike priors. The court sentenced him under the Three Strikes law to two 25-years-to-life terms, to be served concurrently. This court affirmed the judgment in an unpublished opinion (*People v. Mickey* (Dec. 29, 1999, B127039) [nonpub. opn.]).

B. *The Petition for Recall of Sentence*

In March 2013, Mickey filed a petition to recall his sentence pursuant to Proposition 36. The court found that Mickey had stated a prima facie showing of eligibility for resentencing and issued an order to the district attorney to show cause why the petition should not be granted.³

The People argued that Mickey was ineligible for relief under Proposition 36 for two reasons: (1) Mickey intended to inflict great bodily injury on Officer Ryan when he drove toward and hit Officer Ryan's patrol car; and (2) Mickey was armed with a deadly weapon—his vehicle—when he drove the car at Officer Ryan's vehicle.

² At the time of the incident, Penal Code section 241, subdivision (b) provided: "When an assault is committed against the person of a peace officer . . . engaged in the performance of his or her duties . . . and the person committing the offense knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties . . . , the assault is punishable" as a misdemeanor. (Stats. 1988, ch. 816, § 1, p. 2626.)

³ In March 2017, Mickey filed a petition for recall of sentence under the Safe Neighborhoods and Schools Act, or Proposition 47 (§ 1170.18), with respect to the conviction on count two for methamphetamine possession. Counsel thereafter agreed to limit the scope of the hearing on Mickey's Proposition 36 petition to the conviction on count one for evading a police officer.

Mickey contended, among other points, that the People's arguments are foreclosed by the jury's acquittal on count 3, assaulting a police officer with a deadly weapon.

The court agreed with Mickey that his acquittal on the charge of assaulting a police officer precluded the court from finding that he intended to inflict great bodily injury on the police officer or that he was armed with a deadly weapon "as to the collision with Officer Ryan."

Although the court rejected the People's arguments, it explained that "the jury's finding as to [the] collision [with Officer Ryan] does not prevent [the] court from examining the rest of the pursuit to determine if [Mickey] was armed with a deadly weapon at any point while committing the crime of evading a peace officer." (Italics omitted.) The court conducted that examination and concluded that Mickey is ineligible for relief because he "was armed with a deadly weapon during the commission of count one." The court explained: "[T]he evidence at trial established that [Mickey] drove at 45 to 50 miles per hour through a residential area where pedestrians were present and the speed limit was 25 miles per hour. . . . He drove through three stop signs before abandoning his car to flee on foot. . . . Accordingly, even accounting for the jury's verdict [of acquittal on count three, Mickey] willfully used his car in a manner likely to result in injury when he drove at twice the speed limit through a residential area, disregarding multiple stop signs. By willfully using his car in such a dangerous manner, he armed himself with a deadly weapon, regardless of whether he intended to use his car as a weapon."

DISCUSSION

Under Proposition 36, an inmate serving a third-strike sentence for crimes that are not serious or violent felonies may be eligible for reduction in his or her sentence. (§ 1170.126, subd. (e).) Here, there is no dispute that the offenses for which Mickey is incarcerated—evading a police officer by driving with willful and wanton disregard for the safety of others and possessing a controlled substance—are nonserious and nonviolent felonies for purposes of the Three Strikes law.

An inmate is statutorily ineligible for resentencing, however, if, among other disqualifying acts, he “was armed with a . . . deadly weapon” “[d]uring the commission of the current offense.” (§§ 667, subd. (e)(2)(C)(iii); 1170.12, subd. (c)(2)(C)(iii); 1170.126, subd. (e)(2); *People v. Johnson* (2015) 61 Cal.4th 674, 681.)⁴ One is “armed” with a deadly weapon if he or she “has the specified weapon available for use, either offensively or defensively.” (*People v. Bland* (1995) 10 Cal.4th 991, 997.)

To establish ineligibility for relief under Proposition 36 on the ground that the defendant was armed with a deadly weapon, the People must prove that fact beyond a reasonable doubt. (*People v. Perez* (2018) 4 Cal.5th 1055, 1059 (*Perez*); *People v. Frierson* (2017) 4 Cal.5th 225, 236.) When, as here, the court’s ineligibility determination was “‘based on the evidence found in the record of conviction,’” we review that determination for substantial evidence. (*Perez, supra*, 4 Cal.5th at p. 1066.)

⁴ If a petitioner is eligible for resentencing, the court must resentence him or her “unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).) Because the court determined that Mickey was not eligible for relief, it did not reach this consideration.

A deadly weapon includes an object used in “‘a manner as to be capable of producing and likely to produce, death or great bodily injury.’” (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028–1029; accord, *Perez, supra*, 4 Cal.5th at p. 1068.) Our Supreme Court has not clarified what “likely to produce” means in this context other than to say that it “requires more than a mere possibility that serious injury could have resulted from the way the object was used.” (*In re B.M.* (2018) 6 Cal.5th 528, 534; see also *id.* at p. 539 (conc. opn. of Chin, J.).)

Determining the likelihood that an object will produce death or great bodily injury cannot be based on “conjecture as to how the object could have been used. Rather, the determination . . . must rest on evidence of how the defendant actually ‘used’ the object,” and the “potential harm” from such use. (*In re B.M., supra*, 6 Cal.5th at pp. 534–535.) Although an object can be a deadly weapon even if its use caused no injury, the “lack of injury may suggest that . . . the way it was used was not . . . likely to produce death or serious harm.” (*Ibid.*)

Courts have held that a vehicle can be used as a deadly weapon when the defendant drives the vehicle at a police officer, a pedestrian, or an occupied vehicle. (See, e.g., *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 458; *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 5–6, 11; *People v. Golde* (2008) 163 Cal.App.4th 101, 116–117; *People v. Finney* (1980) 110 Cal.App.3d 705, 716; *People v. Claborn* (1964) 224 Cal.App.2d 38, 42.) A vehicle has also been held to be a deadly weapon when it was driven in a reckless manner within a few feet of pedestrians with the intent to scare them. (*People v. Wright* (2002) 100 Cal.App.4th 703, 707, 725.) But evidence that a defendant drove through a residential neighborhood with willful or wanton disregard for the safety of persons or property while being pursued by police in two patrol vehicles was insufficient to support a finding that he used the car

as a deadly weapon. (*People v. Piper* (2018) 25 Cal.App.5th 1007, 1011, 1016, fn. 4.)

Here, the court, in examining the record of conviction, excluded from its consideration the evidence that Mickey drove the Chrysler LHS at and hit Officer Ryan's patrol car. The court disregarded that evidence, it explained, because the jury had acquitted Mickey of the charge of assault upon a police officer with a deadly weapon, and it could " 'not make an eligibility determination contrary to the jury's verdict and findings.' " (Quoting *People v. Piper, supra*, 25 Cal.App.5th at p. 1015.) The court thus based its decision on the facts that Mickey drove 45 to 50 miles per hour in a 25 mile-per-hour residential area when pedestrians were present, without stopping at stop signs. The Attorney General does not challenge the court's decision not to consider the evidence that Mickey drove his car at Officer Ryan's car and does not argue that we should consider that fact in determining the sufficiency of the evidence. We will, therefore, limit our consideration of the evidence to that which the court considered.

The evidence is insufficient to support the finding that Mickey used the car as a deadly weapon. Mickey drove 45 to 50 miles per hour in a residential 25 mile-per-hour zone and ran through stop signs at three 4-way stop intersections. Although Officer Ryan testified that pedestrians were "on either side of the street" and "in this area," there is no evidence that any person was in or crossing a street in Mickey's path, was at or entering an intersection Mickey drove through, or otherwise faced more than a mere possibility of being hit by the vehicle. The fact that Mickey drove on streets near a park and school did not transform his car into a deadly weapon in the absence of evidence that anyone was at the school or park or, if anyone was present, that they were at risk of great bodily injury or death as a result of Mickey's actions.

In its ruling, the trial court stated that Mickey’s “driving before and after [the] collision [with Officer Ryan’s car] was no less dangerous than the driving found to support assault with a deadly weapon . . . in [*People v. Aznavoleh* (2012) 210 Cal.App.4th 1181 (*Aznavoleh*)].” *Aznavoleh*, however, is distinguishable. In that case, the defendant was involved in a street race with another vehicle on a “busy city street” when he entered “a busy intersection” against a red light at a high rate of speed. (*Id.* at pp. 1183–1184, 1189.) Passengers in the defendant’s vehicle told him to slow down, and one screamed that the light was red. (*Id.* at p. 1184.) Although the defendant admitted he saw another vehicle enter the intersection and start to turn left in front of him, the court found that he “made no effort to stop, slow down, or otherwise avoid a collision” with the vehicle. (*Id.* at p. 1189.) The defendant hit the other vehicle, causing injuries to one of his passengers and the driver of the other vehicle. Here, by contrast, there is no evidence that anyone was entering—or even stopped at or approaching—any of the four-way stop intersections that Mickey ran.

Because the evidence is insufficient to support the court’s finding that Mickey was armed with a deadly weapon, we reverse the court’s order denying Mickey’s petition on that basis.

DISPOSITION

The order denying Mickey's petition for recall of sentence as to count one is reversed. The court shall, pursuant to section 1170.126, subdivision (f), determine whether resentencing Mickey "would pose an unreasonable risk of danger to public safety."

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ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.