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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

HOMER RAY BRAZIEL,

Defendant and Appellant.

B286422

(Los Angeles County  
Super. Ct. No. BA183095)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Jonathan B. Steiner and Suzan E. Hier, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Homer Ray Braziel appealed from an order denying his petition for recall of his sentence under the three strikes law pursuant to Penal Code section 1170.126,<sup>1</sup> part of Proposition 36, the Three Strikes Reform Act of 2012. We deemed his notice of appeal a petition for writ of mandate, issued an order to show cause why we should not order the trial court to vacate its order denying the petition, and then denied the petition. The Supreme Court granted review and transferred the matter to this court for reconsideration in light of *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*), which held that section 1170.126 “requires an inmate’s eligibility for resentencing to be evaluated on a count-by-count basis” and that “an inmate may obtain resentencing with respect to a Three Strikes sentence imposed for a felony that is neither serious nor violent, despite the fact that the inmate remains subject to a third strike sentence of 25 years to life.” (*Johnson*, at p. 688.) We reversed the order and remanded the matter to the superior court for further proceedings in accordance with *Johnson* and the procedures specified in section 1170.126.

The trial court held another hearing and denied Braziel’s petition. Braziel appealed again. We now affirm.

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<sup>1</sup> All statutory references are to the Penal Code.

## FACTUAL AND PROCEDURAL BACKGROUND

On May 6, 1999 the People charged Braziel with two counts of assault by means likely to produce great bodily injury (former § 245, subd. (a)(1), now § 245, subd. (a)(4); counts 1 and 4); assault with a deadly weapon, a knife (*id.*, § 245, subd. (a)(1); count 2); and making a terrorist threat (now making a criminal threat, see *People v. Moore* (2004) 118 Cal.App.4th 74, 78-79) (§ 422; count 3). The People alleged Braziel had two prior convictions for serious or violent felonies (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and five prior convictions for which he served prison terms (§ 667.5, subd. (b)). On August 4, 1999 the jury found Braziel guilty on counts 1, 2, and 3 and found true all prior conviction allegations.

The trial court sentenced Braziel under the three strikes law to a prison term of 25 years to life on each count. The court ordered Braziel to serve the sentences on counts 1 and 3 concurrently and stayed execution of sentence on count 2 pursuant to section 654. The court also imposed a term of four years under section 667.5, subdivision (b), for a total prison term of 29 years to life. This court affirmed. (*People v. Braziel* (July 18, 2000, B136493) [nonpub. opn.] (*Braziel I*).)

On May 7, 2013 Braziel filed a petition for recall of his sentence pursuant to section 1170.126. The trial court denied his petition on the ground that one of his current offenses, making a criminal threat, was a serious felony under section 1192.7, subdivision (c)(38), making him ineligible for resentencing.

Braziel filed a notice of appeal, which we deemed a petition for writ of mandate and denied. (*People v. Braziel* (April 9, 2014, B249830) [nonpub. opn.] (*Braziel II*).) Braziel filed a petition for

review, which the Supreme Court granted. The Supreme Court transferred the matter to this court for reconsideration in light of the Supreme Court's decision in *Johnson*.

On remand from the Supreme Court we evaluated each of Braziel's convictions on a count-by-count basis. (*People v. Braziel* (March 1, 2016, B249830) [nonpub. opn.] (*Braziel III*.) We held Braziel's conviction for assault by means likely to produce great bodily injury may or may not be a serious or violent felony, depending on whether Braziel actually inflicted great bodily injury on his victim. (*Ibid.*; see §§ 667.5, subd. (c)(8), 1192.7, subd. (c)(8); *People v. Delgado* (2008) 43 Cal.4th 1059, 1065 ["assault merely by *means likely to produce* [great bodily injury], without the additional element of personal infliction, is not included in the list of serious felonies"]; *People v. Fox* (2014) 224 Cal.App.4th 424, 434, fn. 8 ["assault with force likely to produce great bodily injury is not, by itself, a strike offense," but it is when "“the additional element of personal infliction” of great bodily injury is found present”].) We stated that the People did not allege, and the jury did not find, Braziel actually inflicted great bodily injury, but that the court could review the record of conviction to determine whether Braziel personally inflicted great bodily injury. (*Braziel III*, at p. 4; see *People v. Cook* (2017) 8 Cal.App.5th 309, 315; *People v. Johnson* (2016) 1 Cal.App.5th 953, 966, fn. 12.) We directed the superior court to review the record of conviction to determine whether Braziel inflicted great bodily injury and whether therefore he is ineligible for resentencing on his conviction for assault by means likely to produce great bodily injury. (*Braziel III*, at p. 5.)

The superior court held a hearing on Braziel's eligibility for resentencing on his conviction for assault by means likely to

produce great bodily injury. Applying a preponderance of the evidence standard, the court found Braziel intended to, and did, cause great bodily injury. The court therefore ruled Braziel was not eligible for resentencing under section 1170.126. Braziel timely appealed.

## DISCUSSION

### A. *Applicable Law*

A defendant whose current offense is assault by means likely to produce great bodily injury may be ineligible for resentencing under section 1170.126 in at least two different ways. First, if the conviction is a serious or violent felony under section 667.5, subdivision (c), or section 1192.7, subdivision (c), the defendant may not file a petition for recall of sentence under Proposition 36. (See § 1170.126, subd. (b).) As we stated in *Braziel III*, assault by means likely to produce great bodily injury is a serious felony if the defendant personally inflicted great bodily injury on the victim. Thus, if Braziel inflicted great bodily injury on his victim, his conviction for assault by means likely to inflict great bodily injury is a serious or violent felony and he is not eligible for resentencing under section 1170.126.

Second, even if the defendant did not inflict great bodily injury, section 1170.126, subdivision (e)(2), provides that the defendant is not eligible for resentencing under Proposition 36 if the defendant's current sentence was "imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12." One of the

offenses listed in those statutes is an offense where “the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) Thus, if Braziel intended to inflict great bodily injury on his victim, he is not eligible for resentencing under section 1170.126. (See *People v. Frierson* (2017) 4 Cal.5th 225, 234 [the People can prove the defendant is ineligible “in one of two ways”: prove that the defendant’s current offense was a serious felony or that the defendant intended to cause great bodily injury].)

As stated, the trial court ruled Braziel was not entitled to relief for both of these reasons. The trial court found the injuries to Braziel’s victim, Patricia Williams, were significant and substantial. The court stated that all four individuals who witnessed Williams’s injuries after Braziel’s attack testified Williams “had a cut on her hand, welts and bruises on her face, and facial swelling. These injuries are sufficient for a finding of great bodily injury.” The court also found Braziel intended to cause great bodily injury. The court found: “During the commission of the offense, [Braziel] grabbed Williams and slapped her. [Braziel] chased Williams after she managed to get away, caught her, and began to beat her with both of his fists. Williams fell to the ground and [Braziel] kicked her in the head, back and the side of her stomach. [Braziel] then stabbed at her approximately ten times with a knife. Williams ran into [a friend’s] house for safety. [Braziel] forced his way inside the house, caught Williams, straddled her, and punched her with both fists and kicked her in the stomach. [Braziel] continued to beat Williams until the police were called.” The court ruled: “Accordingly, the court finds that [Braziel] did intend to cause

great bodily injury to Williams in the commission of the offense of assault by means likely to produce great bodily injury.”

B. *The Trial Court Applied What Turned Out To Be the Wrong Legal Standard*

At the time of the trial court’s ruling, there was a split of intermediate appellate authority on whether the standard of proof for determining whether a defendant is eligible for resentencing under Proposition 36 was preponderance of the evidence or beyond a reasonable doubt. In *People v. Frierson*, *supra*, 4 Cal.5th 225 the Supreme Court resolved that split of authority and held that the People have the burden of establishing a petitioner is ineligible for resentencing beyond a reasonable doubt. (*Id.* at pp. 229, 240; accord, *People v. Piper* (2018) 25 Cal.App.5th 1007, 1014; see *People v. Perez* (2018) 4 Cal.5th 1055, 1062 [“once an inmate has made an initial showing of eligibility for resentencing, the burden is on the prosecution to prove beyond a reasonable doubt that one of the grounds for ineligibility applies”].) The trial court’s decision to use the preponderance of the evidence standard to find Braziel was not eligible for resentencing under Proposition 36 on his conviction for assault by means likely to inflict great bodily injury was, we now know, erroneous.

C. *The Trial Court's Error Was Harmless*

The trial court's error occurred in a postconviction proceeding, "an act of lenity on the part of the electorate to which he or she is not constitutionally entitled." (*People v. Esparza* (2015) 242 Cal.App.4th 726, 740.) The Supreme Court's holding in *People v. Frierson* that the proper standard of proof is beyond a reasonable doubt was based on an interpretation of state law and the structure and language of Proposition 36. (*People v. Frierson, supra*, 4 Cal.5th at pp. 235-239.) Therefore, we apply the harmless error standard in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (Cf. *People v. Johnson, supra*, 1 Cal.App.5th at p. 968 [*Watson* harmless error standard applies to trial court's error on a defendant's resentencing petition under Proposition 47].) Under *Watson* the defendant "must show that a different result was reasonably probable . . . ." (*People v. Gonzalez* (2018) 5 Cal.5th 186, 201; see *People v. Mendoza* (2016) 62 Cal.4th 856, 902 [under *Watson*, reviewing court asks "whether it is 'reasonably probable a result more favorable to the defendant would have been reached in the absence of the error'"].)

Braziel did not meet his burden of showing there is a reasonable probability the court would have granted Braziel relief under Proposition 36 even if the court had applied a beyond-a-reasonable-doubt standard. The evidence in the record shows beyond a reasonable doubt that Braziel inflicted great bodily injury on Williams. As a result of Braziel's attack, Williams had bruises on her face and cheek, swelling by her nose, welts on both sides of her face, bleeding from her ear, "a lot of blood all over her hand," and a "footprint" or imprint of a shoe on her back. (See *People v. Escobar* (1992) 3 Cal.4th 740, 752 ["multiple abrasions and lacerations to the victim's back and



bruising of the eye and cheek [has been] found to be great bodily injury”]; *People v. Odom* (2016) 244 Cal.App.4th 237, 247 [““[a]brasions, lacerations and bruising can constitute great bodily injury””]; *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047 [“some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of ‘great bodily injury’”].) Williams also suffered headaches and permanent scarring.

The record also shows beyond a reasonable doubt that Braziel intended to inflict great bodily injury on Williams, indeed that he intended to inflict even greater bodily injury than he was able to inflict. Braziel chased Williams, beat her with his hands, and kicked her multiple times, even after she fell to the ground. One witness testified Braziel hit Williams approximately “16 times in the body alone and her head area.” As Williams lay curled up on the ground, Braziel repeatedly lunged at Williams with a pocketknife and stabbed her ten times in her side, lower body, head, and neck. The only reason Williams’ injuries were not more severe was that the knife Braziel was using was too dull to penetrate her skin more than once. (See *People v. Phillips* (1989) 208 Cal.App.3d 1120, 1124 [“intent to inflict [great bodily] injury may be shown by, and inferred from, the circumstances surrounding the doing of the act itself”].)

## **DISPOSITION**

The order is affirmed.

SEGAL, J.

We concur:

PERLUSS, P.J.

ZELON, J.