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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RODRIGO RUBEN ESCARCEGA,

Defendant and Appellant.

B292566

(Los Angeles County
Super. Ct. No. PA065008)

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

Three Strikes Project, Stanford Law School, Michael S.
Romano and Milena N. Blake for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Noah P. Hill and Analee J. Brodie, Deputy
Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Rodrigo Ruben Escarcega appeals from the postjudgment order denying his petition for recall of his sentence on his conviction for evading an officer with willful disregard for public safety (Veh. Code, § 2800.2, subd. (a)), a felony, and leaving the scene of an accident (Veh. Code, § 20002, subd. (a)), a misdemeanor, and for resentencing pursuant to Penal Code section 1170.126, which was added by Proposition 36. He contends that the trial court erred in determining that he was ineligible for resentencing based upon its finding that he was either armed with a deadly weapon or intended to cause great bodily injury when he committed his crimes.

We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Factual Background

“On the afternoon of July 10, 2009, Officer Evan Richardson of the Los Angeles Police Department was on patrol on Foothill Boulevard in a marked black and white patrol car. Officer Richardson observed an approaching car that was traveling at a high rate of speed. Based on his training, Officer Richardson visually estimated the car’s speed at 85 miles per hour. Officer Richardson made a U-turn and followed the speeding car. The car, a white Ford Escort, continued to exceed the speed limit, in addition to being driven erratically and without the use of turn signals.

“Officer Richardson eventually made a traffic stop and halted his patrol car approximately 15 feet behind the Escort. Officer Richardson noted that the driver, later identified as defendant, was alone in the car. As he approached the car on foot, Officer Richardson saw defendant reach for the gear shift and begin accelerating in reverse. Officer Richardson ran toward his patrol car, believing he was going to be run over by defendant. Defendant then accelerated forward and attempted to make a U-

turn, but collided with a Hummer driven by John Ker. Ker could see inside the Escort and saw only one person, the driver.

“Defendant drove his car between the Hummer and the patrol car, and Officer Richardson began to pursue him after calling for assistance. During the pursuit, defendant failed to stop at a stop sign and drove at approximately 50 miles per hour in a 25 mile-per-hour zone. Defendant made a turn onto Foothill Boulevard against a red light and caused other drivers to slam on their brakes to avoid a collision. Defendant continued to speed and kept swerving over the center divider into oncoming lanes. Fire began coming out of the wheel well of the Escort.

“Defendant’s car eventually stopped, and defendant got out and began to run. He jumped fences and ran through residential yards. Officer Richardson stayed behind to establish a perimeter and clear defendant’s car while other patrol cars and a police helicopter searched for defendant. Officer Richardson saw no one else in defendant’s car. Defendant was found hiding underneath a trailer.

“That evening, Sergeant Michael Hammett interviewed defendant after defendant was given his *Miranda* admonishment and agreed to speak. Defendant said that he had decided he was going to run when Officer Richardson first initiated contact. He collided with a Hummer while making a U-turn and decided that he would continue running. He stopped when it became unsafe to drive. He ran into a yard and hid under a motor home. A search of the Escort revealed several homemade CD’s labeled with defendant’s nickname, ‘Pistol Pete,’ and numerous pieces of mail in defendant’s name.” (*People v. Escarcega* (Sept. 4, 2012, B235280) [nonpub. opn.], fns. omitted.)

Procedural Background

Based upon the foregoing facts, defendant was convicted of violating Vehicle Code sections 2800.2, subdivision (a), and

20002, subdivision (a). The jury also found that defendant had suffered two prior serious or violent felony convictions (Pen. Code, § 667, subds. (a)(1) & (b)-(i)). The jury was unable to reach a verdict on a charge of assault on a peace officer, and a mistrial was declared on that count.

Defendant was sentenced to 25 years to life in state prison. (*People v. Escarcega, supra*, B235280.) He timely appealed, and on September 4, 2012, we affirmed the judgment. (*People v. Escarcega, supra*, B235280.)

On April 10, 2014, defendant filed a petition to recall his sentence under Penal Code section 1170.126.

The People opposed defendant's petition. In support, the People cited to evidence that defendant used his vehicle in a dangerous manner: When Officer Richardson approached defendant in his stopped vehicle, defendant accelerated in reverse, forcing the officer to run out of the way. After defendant collided with the Hummer, defendant reversed his car again, forcing Officer Richardson to jump out of the way. Later, when Officer Richardson was in his patrol car, in pursuit of defendant, defendant went straight towards the officer, forcing Officer Richardson to veer his patrol car out of the way.

After entertaining argument, the trial court denied defendant's petition, reasoning that "it [was] clear to the court that [defendant] was armed with a deadly weapon, his vehicle, as the record indicates that [defendant] attempted to strike Officer Richardson three separate times with his vehicle. . . . [¶] These facts indicate that [defendant] drove his vehicle in a manner that would probably result in physical harm, potentially deadly harm to his victim when he repeatedly tried to strike Officer Richardson. While a vehicle may not be a deadly weapon per se, the size and speed of the vehicle, the manner in which it was used to repeatedly drive at Officer Richardson causing him to run

or jump out of the way, plus testimony of fear that Officer Richardson endured, all speak to [defendant's] vehicle being used as a dangerous or deadly weapon in this instance. Additionally . . . the record shows beyond a reasonable doubt that [defendant] willfully used his vehicle in a manner that he knew would probably and directly result in physical force against Officer Richardson and Ker and [Barry] Koper in the Hummer.” (Fn. omitted.)

In sum, “[defendant’s] actions certainly showed an intent to inflict great bodily injury, even though he did not actually do so. In light of the foregoing, the [trial] court [found] beyond a reasonable doubt that [defendant] intended to inflict great bodily injury during the commission of the offense.” For those reasons, it found defendant ineligible for resentencing and denied his petition.

Defendant’s timely appeal ensued.

DISCUSSION

Penal Code section 1170.126 was enacted as part of Proposition 36, which provides a procedure by which some prisoners already serving third strike sentences may seek resentencing in accordance with new sentencing rules. (*People v. Johnson* (2015) 61 Cal.4th 674, 682.) A defendant is only eligible for resentencing if he is serving an indeterminate term of life imprisonment, pursuant to the “Three Strikes” law, “for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of [Penal Code] Section 667.5 or subdivision (c) of [Penal Code] section 1192.7.” (Pen. Code, § 1170.126, subd. (e)(1).) As is relevant here, a defendant is not eligible for resentencing if, “[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon, or intended to cause great bodily injury to

another person.” (Pen. Code, §§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

“As used in [Penal Code] section 245, subdivision (a)(1), a “deadly weapon” is “any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.”” (*In re B.M.* (2018) 6 Cal.5th 528, 532–533.) “In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue.” (*Id.* at p. 533.) “Whether an object is a deadly weapon under [Penal Code] section 245 does not turn on whether the defendant intended it to be used as a deadly weapon; a finding that he or she willfully used the object in a manner that he or she knew would probably and directly result in physical force against another is sufficient to establish the required mens rea.” (*People v. Perez* (2018) 4 Cal.5th 1055, 1066.)

“Several cases have recognized a vehicle as a deadly weapon based on the manner it was used. (See, e.g., *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 6 [defendant drove a car at two police officers]; *People v. Aznavoleh* (2012) 210 Cal.App.4th 1181, 1183 [defendant raced through a red light at a busy intersection and collided with another vehicle]; *People v. Russell* (2005) 129 Cal.App.4th 776, 787 [defendant pushed the victim into the path of an approaching car].)” (*People v. Perez, supra*, 4 Cal.5th at p. 1065.)

Ample evidence supports the trial court’s determination that defendant was armed with a deadly weapon, specifically his vehicle, at the time he committed his offenses. As the trial court noted, defendant “reversed his vehicle into Officer Richardson, who was on foot, forcing him to run backwards to avoid impact. Then [defendant] drove straight at Officer Richardson, who was

still on foot, forcing him to jump out of the way to avoid being injured or killed. Finally, [defendant] drove his vehicle straight at Officer Richardson's patrol vehicle, forcing Officer Richardson [to] swerve out of the way to avoid a collision." This evidence confirms that defendant used his vehicle as a deadly weapon.

In urging us to reverse, defendant asserts that because he did not intend to hurt anyone—he was merely trying to get away—he was not armed with a deadly weapon at the time he committed his offenses. In so arguing, defendant is essentially asking us to reweigh the evidence. Because we “must defer to the trial court's determination if it is supported by substantial evidence,” which it is here, we cannot, and will not, reweigh the evidence. (*People v. Perez, supra*, 4 Cal.5th at p. 1059; *People v. Cortes* (1999) 71 Cal.App.4th 62, 71 [in determining whether substantial evidence exists, “we do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses”].)

In his reply brief, defendant suggests that because no one was injured by his actions, he could not have been using the vehicle as a dangerous weapon. While the “extent of actual injury or lack of injury [may be] relevant” to our analysis, that does not mean that the absence of injury compels the conclusion that defendant was not using his vehicle in a dangerous manner. (*In re B.M., supra*, 6 Cal.5th at p. 535.)

Finally, defendant asserts that the jury's failure to convict him of assault precluded the trial court from finding that he was armed with a dangerous weapon or intended to commit harm. We disagree. Certainly “the trial court may not make an eligibility determination contrary to the jury's verdict and findings.” (*People v. Piper* (2018) 25 Cal.App.5th 1007, 1015.) But the trial court's findings here were not inconsistent with the jury's failure to reach a decision on the assault charge. A mistrial

following a jury deadlock is not the same as an acquittal. (*People v. Anderson* (2009) 47 Cal.4th 92, 108–109.) The fact that the jury was unable to reach a verdict does not mean that the prosecution lacked sufficient evidence to prove the charge. In fact, the prosecution could have retried defendant on the assault charge if it wanted to; given defendant’s sentence of 25 years to life on the crimes of which he was convicted, the prosecution may have determined that there was no compelling reason to expend the necessary resources for a second trial. It follows that we reject defendant’s unfounded contention that the mistrial on the assault charge precluded the trial court from finding him ineligible for resentencing.

DISPOSITION

The order is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT