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

THE PEOPLE, Plaintiff and Respondent, v. JAMES BELTON FRIERSON, Defendant and Appellant.	B292826 Los Angeles County Super. Ct. No. GA043389

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

Richard B. Lennon, under appointment by the Court of Appeal, 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 Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Appellant James Belton Frierson appeals from an order denying his petition for recall of his sentence under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).[1] Frierson contends the trial court erred in finding him ineligible for resentencing. He raises two arguments: (1) substantial evidence does not support the trial court's finding that he intended to inflict great bodily injury; and (2) because intent to inflict great bodily injury was not at issue in the trial resulting in his underlying stalking conviction, the evidence developed at that trial cannot be sufficient to prove that intent beyond a reasonable doubt. We disagree with Frierson and affirm the trial court's order.

PROCEDURAL BACKGROUND

In 2001, Frierson was convicted of two counts of stalking (§ 646.9, subd. (a), (b).) Based on the additional finding that he had qualifying strike prior convictions (§§ 667, 1170.12), he was sentenced under the Three Strikes Law to an indeterminate term of twenty-five-years-to-life on each count to run consecutively. On direct appeal, this Court held section 654 precluded separate sentencing for the two counts. On issuance of the remittitur, Frierson's sentence was changed to a sentence of twenty-five years to life on one count, with the sentence on the second count stayed.

Following the November 2012 enactment of Proposition 36 by the voters, Frierson filed a petition for recall of the third strike sentences. The prosecution initially filed an opposition arguing Frierson was unsuitable because he posed an unreasonable risk

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[1] Further statutory references are to the Penal Code.

of danger to public safety. Frierson filed a reply arguing he was suitable for resentencing. The prosecution then filed a revised opposition contending Frierson was ineligible for resentencing, as well as unsuitable, because, at the time of the offense, he demonstrated an intent to cause great bodily injury. Frierson filed a second reply to this revised opposition.

The prosecution filed exhibits for admission at the eligibility hearing. Following its consideration of these exhibits, and a hearing at which it heard argument, the court denied the petition based on a factual finding by a preponderance of the evidence that Frierson intended to cause great bodily injury to the victim at the time of the stalking offense, and thus was ineligible for recall and resentencing under Proposition 36. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).)

On appeal, this Court affirmed the decision of the recall court, holding that utilizing a preponderance of the evidence standard was legally correct, and that, under that standard, there was evidence from which the recall court could conclude Frierson intended to inflict great bodily injury on the victim. On review from that decision, our Supreme Court held the recall court must apply a standard of proof beyond a reasonable doubt. (*People v. Frierson* (2017) 4 Cal.5th 225.)

On remand from the Supreme Court, the recall court issued a new decision finding beyond a reasonable doubt that Frierson intended to inflict great bodily injury when he wrote threatening letters from prison to the victim, and thus was ineligible for recall under Proposition 36.

Frierson timely appealed.[2]

FACTUAL BACKGROUND

In 1998, Frierson was convicted of corporal injury to a cohabitant after he struck his then-girlfriend Lynn Thompson in the head, broke her car windshield, put his hands around her throat, and threatened to kill her. She married him while he was incarcerated on that charge. In 1999, while Frierson was still in prison, Thompson informed him she wanted a divorce. In response, Frierson sent Thompson more than a dozen threatening letters. He told her he would track her down; kill her for causing him so much pain; hurt her; and not let her have another man or husband.

Frierson also called Thompson's attention to a news story about a woman who had killed her husband and then committed suicide. He wrote: "I am going to do something to you real bad, because I can't live without you, Lynn. Do you watch the news or hear about what happens to people like you? You need to. I love you, Lynn, so much. Put it like this: this woman loved her man so much and tried to show him how much . . . [t]hat she loved him that she killed her husband, then killed herself. It was on the news yesterday and it [sic] was nothing nobody could do about it. See, you think you are safe because I am in here for now, right? You are wrong . . . . You are my wife for life. You need to understand that, Miss Lynn. I will get you for hurting me like this. Mark my word, Lynn. Okay? Mark my word."

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[2] On February 13, 2019, we granted his request to take judicial notice of the record of his prior Proposition 36 appeal in case B260774.

DISCUSSION

The voters approved the Three Strikes law in 1994 "to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (Former § 667, subd. (b), as amended by Stats. 1994, ch. 12, § 1, pp. 71–72.) Under the law, defendants who committed a felony after two or more prior convictions for serious or violent felonies were sentenced to "an indeterminate term of life imprisonment with a minimum term of" at least 25 years. (Former § 1170.12, subd. (c)(2)(A), added by Prop. 184, § 1, as approved by voters, Gen. Elec. (Nov. 8, 1994).)

In 2012, Proposition 36 narrowed the class of third strike felonies for which an indeterminate sentence could be imposed. Now a defendant convicted of a felony outside of that class can receive at most a sentence enhancement of twice the term otherwise provided as punishment for that felony. (§ 1170.12, subd. (c)(2)(C); see *People v. Conley* (2016) 63 Cal.4th 646, 652-653.) But Proposition 36 makes a defendant ineligible for this limitation on third strike sentencing if one of various grounds for ineligibility applies. (§ 1170.12, subd. (c)(2)(C).) One of those grounds is "[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person." (§ 1170.12(c)(2)(C)(iii).)

Proposition 36 also authorizes an inmate currently serving an indeterminate term under the original Three Strikes law to petition the trial court for resentencing. (§ 1170.126, subds. (a), (b).) Upon receiving such a petition, the trial court "shall determine whether the petitioner satisfies the criteria" for resentencing eligibility, including whether the petitioner's third strike offense was neither serious nor violent. (§ 1170.126,

subds. (e), (f).) If the petitioner is found eligible for resentencing, he or she "shall be resentenced pursuant to [Proposition 36] 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).) As with defendants to be prospectively sentenced for a third strike offense, an already sentenced inmate whose third strike was a nonserious, nonviolent felony and who otherwise satisfies the criteria for resentencing is nonetheless ineligible for resentencing if his or her current sentence was imposed for an offense during which he or she "intended to cause great bodily injury to another person." (§ 1170.12, subd. (c)(2)(C)(iii); see § 1170.126, subd. (e)(2).)

1. Substantial Evidence Supports the Trial Court's Finding of Intent to Inflict Great Bodily Injury

Frierson argues insufficient evidence supports the trial court's factual finding that he intended to inflict great bodily injury on his wife. We disagree. On appeal, we defer to the trial court's factual determination if it is supported by substantial evidence. (*People v. Perez* (2018) 4 Cal.5th 1055, 1059 (*Perez*).) Applying this deferential standard, we conclude substantial evidence supported the trial court's finding that Frierson intended to inflict great bodily injury. The record shows Frierson sent his wife numerous letters threatening to physically harm or kill her. He sent these letters while he was in prison for inflicting corporal injury on her. These facts were sufficient to support the trial court's finding.

Frierson points out that not all the letters he wrote to his wife were threatening. Although it is true that some parts of the letters had a less violent and more reconciliatory tone than others, as the reviewing court it is not our role to reweigh

competing evidence. (*People v. King* (2010) 183 Cal.App.4th 1281, 1320.)

2. It Was Proper for the Trial Court to Find Frierson Ineligible for Relief

Frierson argues that since intent to inflict great bodily injury was not at issue at trial, and he thus had neither motive nor opportunity to either present or challenge evidence on the matter, evidence of that conduct adduced at trial cannot be sufficient to prove that conduct beyond a reasonable doubt. We reject this contention.

Subdivision (f) of section 1170.126 provides: "Upon receiving a petition for recall of sentence under this section, *the court shall determine* whether the petitioner satisfies the criteria" for resentencing eligibility. (Italics added.) As noted previously, an already sentenced inmate whose third strike was a nonserious, nonviolent felony and who otherwise satisfies the criteria for resentencing is nonetheless ineligible for resentencing if his or her current sentence was imposed for an offense during which he or she "intended to cause great bodily injury to another person." (see §§ 1170.126, subd. (e)(2); 1170.12, subd. (c)(2)(C)(iii); 667, subd. (e)(2)(C)(iii).) The same is true if the current sentence was imposed for an offense during which the defendant "used a firearm," or "was armed with a firearm or deadly weapon." (*Ibid.*)

Not only does Proposition 36 explicitly authorize the trial judge to decide on resentencing whether the petitioner intended to inflict great bodily injury, but that procedure has been validated by our Supreme Court. It has held trial courts are permitted to make these factual findings based on the record of conviction. (See e.g. *Perez*, *supra*, 4 Cal.5th at p. 1059 ["Proposition 36 permits a trial court to find a defendant

[ineligible for relief][] . . . if the prosecutor proves [the] basis for ineligibility beyond a reasonable doubt."]; *ibid.* ["the trial court's eligibility determination may rely on facts not found by a jury."]; see also *People v. Estrada* (2017) 3 Cal.5th 661, 665 (*Estrada*) ["a trial court may deny resentencing under the act on the basis of facts underlying previously dismissed counts."].)

Our Supreme Court has considered Frierson's concerns about lack of motive or opportunity to present evidence at trial and implicitly rejected them: "Before passage of the Act, prosecutors had little reason to prove any conduct on a defendant's part that now constitutes disqualifying conduct under section 1170.12, subdivision (c)(2)(C)(iii). [citation] . . . . [A] judgment that predates Proposition 36 may at times fail to imply anything about disqualifying conduct, even if the evidence available to the prosecution could have supported such a finding. For this reason, we think it unlikely that it was part of the Act's design to prevent courts reviewing a recall petition from considering conduct beyond that implied by the judgment." (*Estrada*, *supra*, 3 Cal.5th at p. 671.) "Precluding a court from considering facts not encompassed within the judgment of conviction would be inconsistent with the text, structure, and purpose of sections 1170.12, subdivision (c)(2)(C)(iii) and 1170.126, subdivision (e)(2)—and would, by consequence, impose an unnecessary limitation." (*Id.* at p. 672.)

Taken to its logical conclusion, Frierson's argument would lead to absurd results. Let us assume, for example, that Frierson was disqualified not based on a finding he intended to inflict great bodily injury, but rather based on a finding that he was armed with a firearm. (See §§ 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii).) Let us further assume that whether he was

armed with a firearm was not at issue at his original trial, but that every witness testified he was armed during the commission of the underlying offense, and even he testified he was armed. Under the argument Frierson now raises, a recall court would nevertheless be precluded from finding him armed beyond a reasonable doubt simply because it was not at issue at the original trial. That result conflicts with Proposition 36's purpose. Moreover, were we to accept Frierson's argument, the practical effect would be that his sentence would automatically be reduced by operation of law, a result that runs contrary to the plain language of section 1170.126 and that our Supreme Court has rejected. (See *Perez*, *supra*, 4 Cal.5th at p. 1064 ["Proposition 36 does not automatically reduce, recall, or vacate any sentence by operation of law."].)

In support of his argument, Frierson relies by analogy on *People v. Hernandez* (1988) 46 Cal.3d 194. Unlike Frierson's case, *Hernandez* did not involve the retrospective application of an ameliorative statute. The defendant in *Hernandez* was convicted by jury of rape, assault, and kidnapping. (*Id.* at pp. 199, 205.) The trial court imposed a three-year enhancement under section 667.8 (kidnapping for purposes of committing rape) even though the allegation had never been pled and proven. (*Id.* at pp. 199-200.) The Supreme Court reversed, explaining the imposition of the enhancement violated due process. (*Id.* at p. 208.) But in *Estrada*, *supra*, 3 Cal.5th at pp. 671-672, our Supreme Court disavowed any need to reconcile the universe of facts that may be considered for a sentencing enhancement with those that may be considered in connection with a Proposition 36 recall petition.

Thus, Frierson's argument is foreclosed by *Estrada*, *supra*, 3 Cal.5th 661, *Perez*, *supra*, 4 Cal.5th 1055, and the plain

language of section 1170.126, subdivision (f). It was proper for the trial court to conclude beyond a reasonable doubt Frierson intended to inflict great bodily injury.

DISPOSITION

Affirmed.

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CURREY, J.

WE CONCUR:

MANELLA, P. J.

COLLINS, J.