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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.

JAMES KALFRED DORMAN,

Defendant and Appellant.

B286517

(Los Angeles County
Super. Ct. No. GA022082)

APPEAL from an order 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, Paul M. Roadarmel, Jr. and Daniel C. Chang,
Deputy Attorneys General, for Plaintiff and Respondent.

James Kalfred Dorman petitioned for recall of sentence under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).¹ The superior court denied Dorman's petition, finding he was ineligible for resentencing because his current sentence had been imposed for an offense (inflicting corporal injury on a spouse, cohabitant or parent of the offender's child) committed with the intent to cause great bodily injury. On appeal Dorman contends the court erred in finding him ineligible because it used the preponderance-of-the-evidence standard of proof, rather than the beyond-a-reasonable-doubt standard. The People concede the court used the wrong standard of proof, but argue the error was harmless because it is not reasonably probable the court, employing the proper standard, would not have ruled that Dorman intended to cause great bodily injury when committing the underlying domestic violence crime. We agree the error was harmless and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Commitment Offense

Kimberly B. was Dorman's girlfriend and the mother of his two children. On November 20, 1994 Dorman charged Kimberly, who was sitting on a couch in their apartment, and kneed her in the chest. Dorman was angry that Kimberly had shown attention to one of their children after he fell down. Kimberly was knocked back by the force of the blow, experienced pain and had trouble breathing.

Dorman struck Kimberly again the next day, punching her once in the face with his closed fist as she walked through the door to the apartment after running errands. Dorman

¹ Statutory references are to this code.

admonished Kimberly, “You shouldn’t have left me.” The force of Dorman’s punch knocked Kimberly to the floor. She suffered two cheekbone fractures and a broken tooth and received an injection of pain medication for her injuries later that day when admitted to Glendale Adventist Hospital. A radiologist who subsequently examined Kimberly testified the fractures were consistent with a blow to the cheek area that would have required “quite of bit of force.”

After striking Kimberly, Dorman urged her to look inside their bedroom. Dorman had thrown a hammer through the screen of the bedroom television set and broken a mirror. He had also defaced portions of the apartment with obscene language and scrawled “die bitch” onto a window in the children’s bedroom.

During a later interview with a detective investigating the assault, Kimberly revealed that Dorman had threatened to kill her during the November 21st incident, warning: “You better shut up. You’re lucky I don’t kick your butt and kill you now.” Kimberly also said Dorman had threatened to kill her if she went to police and had assaulted her every two or three days since his release from prison that summer.

2. Jury Verdict and Sentencing

Dorman was charged with two counts of inflicting corporal injury on a spouse, cohabitant or parent of the offender’s child (§ 273.5, subds. (a), (b)). The jury was unable to reach a verdict on the count involving the November 20 offense but convicted Dorman on the second count related to the November 21st attack. The jury also found true the special allegations that Dorman had suffered two prior strike convictions for burglary (§ 459). Dorman was sentenced under the three strikes law to an indeterminate state prison term of 25 years to life.

3. *Dorman's Petition for Recall of Sentence*

On November 27, 2012 Dorman filed a petition for recall of his sentence and resentencing under Proposition 36, which amended the three strikes sentencing scheme to provide, in general, that a recidivist is not subject to an indeterminate life term for a third strike felony that is neither serious nor violent, unless the offense satisfies other criteria identified in the statutes. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C); see *People v. Frierson* (2017) 4 Cal.5th 225, 229 (*Frierson*).) It also permitted some inmates serving a three strikes sentence to petition for the recall and modification of their current sentence on the ground they would not have been subject to an indeterminate life sentence had Proposition 36 been in effect at the time of their sentencing. (§ 1170.126, subd. (b).)

Dorman argued in his petition he was eligible for recall of his sentence because his third strike conviction for inflicting corporal injury on a cohabitant was not a serious or violent felony within the meaning of the three strikes law and neither of his prior strike convictions disqualified him. The superior court issued an order to show cause why the petition should not be granted. The People opposed the petition, asserting Dorman was ineligible for resentencing under section 1170.126, subdivision (e)(2), because, “[d]uring the commission of the current offense, the defendant . . . intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) The People also argued Dorman was unsuitable for resentencing.

Following a hearing on October 2, 2017, the superior court found by a preponderance of the evidence that Dorman was ineligible for resentencing because he had intended to cause great

bodily injury to Kimberly when he struck her on November 21, 1994.

DISCUSSION

1. Governing Law

Proposition 36 was intended to “[r]estore the Three Strikes law to the public’s original understanding by requiring life sentences only when a defendant’s current conviction is for a violent or serious crime” and to permit “repeat offenders convicted of non-violent, non-serious crimes like shoplifting and simple drug possession [to] receive twice the normal sentence instead of a life sentence.” (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 6.) As part of its goal of limiting indeterminate life sentences to serious or violent felony offenders, Proposition 36 added section 1170.126, which permits inmates previously sentenced to life terms under an earlier version of the three strikes law to petition to recall their sentences and, if eligible for relief, to be resentenced to the term that would have been imposed for their crime under the new sentencing provisions. (§ 1170.126, subd. (a).) Even if the petitioner is otherwise entitled to be resentenced under the new three strikes law, however, the petition may be denied if “the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.126, subd. (f).)

An inmate is eligible for resentencing if his or her current sentence was not imposed for a violent or serious felony and was not imposed for any of the offenses described in clauses (i) to (iv) of section 1170.12, subdivision (c)(2)(C), or clauses (i) to (iv) of section 667, subdivision (e)(2)(C). (§ 1170.126, subd. (e); see also *People v. Estrada* (2017) 3 Cal.5th 661, 667.) Those clauses

describe certain kinds of criminal conduct, including offenses during which the “the defendant . . . intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

2. *The Superior Court Employed the Incorrect Standard of Proof*

The resentencing provision of Proposition 36 does not expressly identify the standard of proof to be applied to determine an inmate’s eligibility for resentencing. At the time of the hearing on Dorman’s petition for recall of sentence, most courts of appeal that had addressed the issue had held the correct standard of proof was preponderance of the evidence. Applying that standard the superior court found Dorman had committed the underlying act of domestic violence with the intent to cause great bodily injury to Kimberly, thus making him ineligible for resentencing under Proposition 36.

Approximately one month after the trial court’s ruling the Supreme Court decided *Frierson*, *supra*, 4 Cal.5th 225, which held the People must establish ineligibility for resentencing beyond a reasonable doubt. (*Id.* at p. 240; accord, *People v. Perez* (2018) 4 Cal.5th 1055, 1059 [“Proposition 36 permits a trial court to find a defendant . . . ineligible for resentencing only if the prosecutor proves [the] basis for ineligibility beyond a reasonable doubt”].)

3. *The Superior Court’s Error Was Harmless*

The Supreme Court’s holding in *Frierson* that the proper standard of proof is beyond a reasonable doubt was based on an interpretation of state law. (*Frierson*, *supra*, 4 Cal.5th at pp. 235-239.) Accordingly, the superior court’s error in applying a preponderance-of-the-evidence standard is evaluated under the

harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836, which requires the defendant to show it is reasonably probable a more favorable result would have been reached in the absence of the error. (See *People v. Gonzalez* (2018) 5 Cal.5th 186, 201; *People v. Mendoza* (2016) 62 Cal.4th 856, 902.)

Dorman did not carry his burden of showing there is a reasonable probability the superior court would have granted his petition under Proposition 36 if the court had applied a beyond-a-reasonable-doubt standard.

a. “*Great bodily injury*” under California law

“Great bodily injury” is statutorily defined as “a significant or substantial physical injury.” (§ 12022.7, subd. (f); see CALCRIM No. 3160 [*“Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm”*].) To rise to the level of great bodily injury, an injury need not result in “‘permanent,’ ‘prolonged’ or ‘protracted’ disfigurement, impairment, or loss of bodily function.” (*People v. Escobar* (1992) 3 Cal.4th 740, 750.)

Lacerations, bruises and abrasions are sufficient to sustain a finding of great bodily injury. (*People v. Odom* (2016) 244 Cal.App.4th 237, 247; *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047.) Similarly, a bone fracture, even a facial fracture where no surgery is required, can constitute great bodily injury. (*People v. Nava* (1989) 207 Cal.App.3d 1490, 1499; see *People v. Villarreal* (1985) 173 Cal.App.3d 1136, 1140-1141 [evidence of a bone fracture supports a true finding on the great bodily injury enhancement and in some circumstances establishes a “significant or substantial injury” as a matter of law].) And an injury caused by hands or fists alone may be

sufficient to constitute great bodily injury. (See *People v. Aguilar* (1997) 16 Cal.4th 1023, 1037-1038 [an assault by means of force likely to produce great bodily injury may be committed with the hand or fists]; *People v. Davis* (1996) 42 Cal.App.4th 806, 818 [many decisions hold that hands or fists may be used with sufficient force to create great bodily injury].)

b. *It is not reasonably probable Dorman would have achieved a more favorable result if the proper standard had been applied*

In its memorandum of decision the superior court emphasized the severity of Kimberly's injuries—her cheekbone was fractured in two places; she had a broken tooth; and there was swelling and bruising on her face. The court also noted Kimberly's resulting pain, especially when biting, frequent nose bleeds and her need for medical attention to control the pain. Based on this evidence, the court found Dorman had intended to cause great bodily injury, properly using the presumption that "where one applies force to another in a manner reasonably certain to produce, and actually producing, great bodily injury, the requisite intent can be presumed, since the intent with which an act is done may be inferred from the circumstances attending the act" (*People v. Phillips* (1989) 208 Cal.App.3d 1120, 1124; accord, *People v. Harvey* (1992) 7 Cal.App.4th 823, 826.)

Although acknowledging that Dorman had thrown only one punch, the court noted that the radiologist had opined that "quite a bit of force" was required to produce the facial fractures. (See *In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1162 [affirming the juvenile court's finding an assault had been committed by means of force likely to produce great bodily injury where a single blow, delivered without warning to the side of the victim's head, was sufficient to knock her down and pop her jaw out and then back

in].) In addition, the court relied upon the evidence of Dorman's threats of physical harm to Kimberly, his destructive actions in their apartment on the day of the assault and his three-month history of abuse against the victim as further circumstantial evidence of his intent to cause her great bodily harm. (See *People v. Guilford* (2014) 228 Cal.App.4th 651, 661-662 [trial court could reasonably find defendant intended to inflict great bodily injury during current offense based on evidence he had physically abused his spouse in the past].)

The evidence in the record, described in full and accurate detail by the superior court, establishes beyond a reasonable doubt that Dorman inflicted great bodily injury on Kimberly and that he intended to do so. The court's error in applying the incorrect standard of proof was harmless.

DISPOSITION

The order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.