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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WAYNE EDWARD WOODS, Defendant and Appellant.	B294030 (Los Angeles County Super. Ct. No. TA033082)

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

California Appellate Project, Richard Lennon, Executive Director, and Melissa L. Camacho-Cheung, 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, Assistant Attorney General, Noah Hill and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Wayne Edward Woods appeals from the denial of his petition under Penal Code section 1170.126[1] for resentencing on his 1996 stalking conviction for which he received a Third Strike sentence. He contends that the trial court's finding he was ineligible for resentencing because he intended to cause great bodily injury to the victim must be reversed because: (1) substantial evidence does not support the finding, (2) the trial court improperly relied on evidence that supported acquitted counts and conduct that occurred before the stalking offense, (3) the trial court relied on a vacated appellate decision, and (4) the court relied on evidence in the record of conviction that appellant lacked the motive and opportunity to contest at the time of trial. We reject these contentions, and affirm the trial court's ruling.

BACKGROUND

Three Strike Sentences

In 1996, a jury convicted appellant of stalking Naomi Adams on and between January 9 and January 26, 1995 (§ 646.9, subd. (a)) as charged in count 1 of the information, and of committing a criminal threat against her on or about January 15, 1995 (§ 422) as charged in count 5. The jury acquitted appellant of two counts of criminal threats against Adams: count 3 (alleged to have occurred on or about January 9, 1995), and count 6 (alleged to have occurred on or about January 17,

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1 All further section references are to the Penal Code.

1995.)[2] The trial court found that appellant had two prior strike convictions within the meaning of the Three Strikes law (§§ 1170.12, subd. (a)-(d), 667, subd. (b)-(i)): voluntary manslaughter (§ 192.1), and assault with a deadly weapon (§ 245, subd. (a)), both offenses occurring in 1982. The trial court sentenced appellant to prison for a term of 25 years to life on both the stalking offense (count 1) and criminal threats (count 5) conviction, but stayed the sentence on the criminal threats count under section 654. This court affirmed the judgment of conviction in an unpublished opinion.

Evidence at Trial

In our unpublished opinion affirming the conviction, we summarized the trial evidence as follows (we have broken the summary down into individual incidents by date for ease of discussion for purposes for this opinion).

"[Naomi] Adams and appellant first met in October 1991 and began a sometimes stormy but intimate relationship. Each were still married to others. In April 1993, appellant moved in and lived with Adams . . . .

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[2] Two additional counts charging misdemeanor battery occurring on or about December 15, 1994 and January 9, 1995, respectively, were dismissed, but evidence of the events of those dates was admitted at trial.

1. *Incident of July 20, 1994*

"On July 20, 1994, Adams and appellant agreed to begin living apart at the end of the month until their marriages had been resolved. However, while appellant was at work that date, Adams began moving out. Appellant came home early and . . . ordered Adams and her relatives to put everything back in the residence. They refused and he retrieved a rifle and threatened to shoot Adams. He also slapped her in the face. . . . Adams moved to another residence.

"In August . . . Adams and appellant reconciled. . . ."

2. *Incident of December 15, 1994*

"On December 15, 1994, a telephone incident involving another woman caused a confrontation. Appellant came to Adams' residence, shouted 'Rambo,' kicked down the front door, and then grabbed and slapped Adams. He held her by the collar and accused her of deceiving him. . . . For the next three days Adams refused to speak with appellant. However, she finally relented and they again reconciled."

3. *Incident of January 9, 1995*

"On January 9, 1995, the couple argued and appellant told her that the devil would come and kick her door down and tell her what to do. He also spoke of the number '666' as being the mark of the devil. Adams believed that appellant was referring to himself and looked at him with fear. They continued to argue and appellant slapped her, he grabbed her by the collar, threatened to 'do an O.J.' on her and called

her 'Nicole.' He told her that he could kill her without anyone finding out and that it would not bother him because he had done it before. He also threatened to detonate her sister's car and slash her brother's throat. . . . Appellant left to sign up for a domestic violence class and Adams . . . obtained an emergency protective order which she posted on her door."

4. *Incident of January 12, 1995*

"On January 12, 1995, Adams drove a friend . . . to appellant's apartment so that [she] could serve the restraining order. . . . Appellant had been warned and was not present. However, as [they] left the parking lot, appellant followed them in his truck. Adams made a quick U-turn to avoid appellant and he then drove head-on towards her car, trying to run her off the road. She turned into a gas station where she became blocked in. . . . Appellant ran towards her making threats that he would kill her and that he was angry about the restraining order."

5. *Incident of January 15, 1995*

"On January 15, 1995, Adams awoke and found a red flare on her front porch. Appellant called and spoke to Adams' sister and asked if Adams had received the 'gift' he left on the porch. He also called Adams . . . and said he was going to kill her."

6. *Incident of January 17, 1995*

"On January 17, 1995, as Adams was leaving her home with a friend, appellant was sitting outside in his truck. Adams returned to the house and called the police. Appellant called Adams and said '666.' She hung up. He called again and she let the answering machine take the message which was to the effect that he 'wouldn't let go,' or he 'wanted gold, 666.' . . ."

7. *Incident of January 18, 1995*

"On January 18, 1995, Adams received a telephone call from appellant and appellant advised her that he would 'endanger everyone.'"

8. *Incident of January 24, 1995*

"On January 24, 1995, about 1:30 or 2:00 a.m., when Adams was in bed, she heard the sound of glass breaking. She went to the living room and discovered a window had been shattered. On the floor was a brick to which was attached another flare. Appellant called Adams and told her she should 'be glad it wasn't a cocktail' and that he would be back that night. He called back again but she hung up and called the police. The following day Police Detective Benito Aguirre recovered the brick and the flare from Adams. She appeared frightened and asked Aguirre to prevent appellant from terrorizing her."

Petition for Resentencing—First Ruling

In November 2014, appellant filed a petition to recall the sentence and for resentencing on his stalking conviction under section 1170.126. The trial court denied the petition, finding by a preponderance of evidence that appellant was ineligible for resentencing because he intended to cause great bodily injury upon the victim during the commission of the commitment offense. (Opn. 6.) On appeal from that ruling, we reversed because in *People v. Frierson* (2017) 4 Cal.5th 225 (*Frierson*) (decided after the trial court's ruling) the California Supreme Court held that a finding of ineligibility must be made under the beyond-a-reasonable-doubt standard.

Petition for Resentencing—Ruling on Remand

On remand, the trial court held another eligibility hearing on October 1, 2018. No new evidence was presented. After argument, the court found beyond a reasonable doubt that appellant was ineligible for resentencing because in the commission of the stalking offense he had the intent to inflict great bodily injury. (See §§ 1170.126, subd. (e)(2), 1170.12, subd. (c)(2)(C)(iii), 667, subd. (e)(2)(C)(iii).)

We discuss, below, the aspects of the trial court's ruling that appellant challenges in this appeal.

DISCUSSION

Under the Three Strikes Reform Act, any person serving a Three Strikes sentence whose triggering offense is not defined as serious or

violent (§ 667.5, subd. (c); 1192.7, subd. (c)), may file, before the court that entered the judgment of conviction, a "petition for a recall of sentence" (§ 1170.126, subd. (b)). The Act makes ineligible for resentencing those who "[d]uring the commission of the current offense . . . intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii); accord, 1170.12, subd. (c)(2)(C)(iii); 1170.126, subd. (e)(2).)

By referring to those facts attendant to commission of the actual offense, the express statutory language requires the trial court to make a factual determination that is not limited by a review of the particular statutory offenses and enhancements of which petitioner was convicted (*People v. Bradford* (2014) 227 Cal.App.4th 1322, 1332 (*Bradford*).) In other words, an eligibility determination is not limited to a review of the elements of the commitment offense. (*Ibid.*) "Rather, the court may examine relevant, reliable, admissible portions of the record of conviction to determine the existence or nonexistence of disqualifying factors. [Citation.]" (*People v. Blakely* (2014) 225 Cal.App.4th 1042, 1063.) This includes the facts recited in any prior appellate decisions. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286 (*Hicks*).)

The burden is on the prosecution to prove beyond a reasonable doubt that one of the grounds for ineligibility applies. (*Frierson, supra*, 4 Cal.4th at p. 230.) This Court reviews a trial court's factual findings regarding ineligibility for substantial evidence. (*People v. Perez* (2018) 4 Cal.5th 1055, 1066; *Hicks, supra*, 231 Cal.App.4th at p. 286.) Under that test, the appellate court views the evidence in the light most

favorable to the trial court's finding and does not reweigh the evidence or reappraise the credibility of witnesses. (*People v. Perez, supra*, 4 Cal.5th at p. 1066; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

I. *Substantial Evidence*

Appellant contends that substantial evidence does not support the trial court's finding that he intended to cause great bodily injury to Adams during the commission of the stalking offense of which he was convicted. He is mistaken.

In making its finding, the trial court summarized the eight incidents shown by the evidence at trial, which we have discussed above in the BACKGROUND section of our opinion. We need not describe them again here. The court characterized that evidence as demonstrating a compelling inference that in the commission of the stalking, appellant intended to inflict great bodily injury on Adams, even though he did not actually inflict such injury. We agree with the trial court's analysis.

As the court stated in relevant part: "[Appellant] was the subject of multiple restraining orders and calls to the police. On numerous occasions, [appellant] slapped, grabbed and threatened the victim. [Appellant] destroyed her property, referred to himself as the devil and O.J. Simpson and Ms. Adams as Nicole Simpson, threatened to kill [the] victim's family or blow up their cars and called repeatedly with threats at all hours of the day and night. [Appellant] attempted to run Adams off the road, threw a brick through her house window and stated that he

would 'not let [her] go[.]'" "All of this occurred repeatedly over the aforementioned six-month period but especially mid-December 1994 and January 24, 1995. [Appellant] was arrested for his current convictions on January 26, 1995. . . . [T]he factual circumstances of [appellant's] stalking clearly evidence an intent to cause great bodily injury. [Appellant] threatened to kill [the] victim on numerous occasions over the course of approximately six months."

The court also observed that "[appellant] has a history of violent crime and specifically has been convicted of voluntary manslaughter and assault with a deadly weapon in 1982. . . . [¶] In the Court's view, the People have amply met their burden of showing beyond a reasonable doubt that [appellant] is ineligible for resentencing because . . . '[d]uring the commission of the current offense, . . . [he] intended to cause great bodily injury to another person' (Penal Code section 1170.12 (c)(2)(C)(iii))."

The court's analysis speaks for itself. Appellant's contention that the evidence does not support the court's finding is simply an attempt to reweigh the evidence, which we will not do. Substantial evidence supports the finding that appellant intended to inflict great bodily injury on Adams during the commission of the stalking offense.

II. *Evidence Relating to the Acquitted Counts*

Appellant contends that the trial court erroneously considered evidence of the January 9 and 17, 1995 incidents because in counts 3 and 6, which charged criminal threats (§ 422) on or about those dates,

the jury acquitted him. In the January 9 incident, defendant slapped Adams, referred to himself as the devil, and threated to "do an O.J." on her. In the January 17 incident, defendant was outside Adams house in his truck, called Adams, and said he would not let her go and "wanted gold, 666."

According to appellant, because his defense evidence at trial disputed that these events occurred, the jury must have concluded that the events did not occur. Therefore, appellant asserts that the trial court could not rely on those events to infer that during the stalking offense appellant intended to inflict great bodily injury on Adams. Appellant's analysis is faulty.

As this court held in *People v. Piper* (2018) 25 Cal.App.5th 1007, "Under *Frierson* and *[People v.] Arevalo* [(2016) 244 Cal.App.4th 836], on a resentencing petition, the trial court may not make an eligibility determination contrary to the jury's verdict and findings. To do so would allow the People, contrary to the Reform Act, to 'compensate for any potential evidentiary shortcoming at a trial predating the Act.' (*Frierson, supra*, 4 Cal.5th at p. 238.) It also would allow a trial court, contrary to *Johnson* [*People v. Johnson* (2015) 61 Cal.4th 674], to 'turn[] acquittals and not-true enhancement findings into their opposites.' (*Arevalo, supra*, 244 Cal.App.4th at p. 853.)" (*Piper, supra,* 25 Cal.App.5th at p. 1015.) While it is true that on a resentencing petition the trial court cannot make an ineligibility finding that is inconsistent with the jury's verdict of acquittal or not-true-enhancement finding, there is no prohibition against the court considering evidence that

supported an acquitted count or not-true finding, unless in making the finding of ineligibility the court relies on a theory that is necessarily legally or factually inconsistent with the jury's verdict of acquittal or not-true finding itself.

Here, on counts 3 and 6, the jury acquitted defendant of making a threat to kill or cause great bodily injury to Adams on January 9 and 17, respectively, within the meaning of section 422.[3] But on count 1 the jury also convicted defendant of stalking Adams on and between January 9 and 26, a period that includes the incidents of January 9 and 17. In doing so, the jury necessarily concluded as to the stalking count that on or between January 9 and 26, within the meaning of section 646.9, appellant: (1) willfully and maliciously harassed Adams, or willfully, maliciously and repeatedly followed her, and (2) made a

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[3] To prove a violation of section 422, the prosecution must prove "'(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat—which may be "made verbally, in writing, or by means of an electronic communication device"—was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.' [Citation.]" (*In re George T.* (2004) 33 Cal.4th 620, 630.)

credible threat with the intent to place Adams in reasonable fear for her safety or that of her family.[4]

To the extent the verdicts on counts 1, 3, and 6 were inconsistent as to whether the jury found appellant made a threat against Adams on January 9 and 17, and as to precisely what conduct (if any) he engaged in on those dates, the law gives effect to each of the jury's verdicts. and the findings implied therein. Any inconsistency among them is disregarded. "As a general rule, inherently inconsistent verdicts are allowed to stand. [Citations.] For example, 'if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to both.' [Citation.] . . . It is possible that the jury arrived at an inconsistent conclusion through 'mistake, compromise, or lenity.' [Citation.] Thus, if a defendant is given the benefit of an acquittal on the count on which he was acquitted, 'it is neither irrational nor illogical' to require him to accept the burden of conviction on the count on which the jury convicted. [Citation.]" (*People v. Avila* (2006) 38 Cal.4th 491, 600.) In short, the jury's acquittal verdicts on counts 3 and 6 does not affect the validity of the jury's guilty verdict on count 1, and does not affect the necessary findings implied in that guilty verdict. Therefore, the jury's acquittal on criminal threats charged in counts 3 and 6 does not compel the

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[4] "The elements of the crime of stalking (§ 646.9) are (1) repeatedly following or harassing another person, and (2) making a credible threat (3) with the intent to place that person in reasonable fear of death or great bodily injury. [Citation.]" (*People v. Ewing* (1999) 76 Cal.App.4th 199, 210.)

conclusion that, in convicting on the stalking count charged in count 1, the jury concluded that appellant engaged in no threatening behavior on January 9 and 17. As a result, the trial court's consideration of the evidence of the January 9 and 17 incidents in inferring appellant's intent to inflict great bodily injury on Adams during the stalking offense did not contradict the jury's verdict of acquittals on counts 3 and 6.

Moreover, the evidence of defendant's conduct and threats on January 9 and 17 was clearly relevant in determining the larger question whether defendant made a credible threat with the intent to place Adams in reasonable fear for her safety on and between January 9 and 26 with respect to the stalking count. Other incidents of threats or violence between the defendant and the victim are relevant to prove the defendant's motive and intent with respect to the charged crime. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118 (*Barnett*).) Further, consideration of the other crimes evidence as relevant to motive and intent is not made inadmissible by reason of the defendant's acquittal of the other crimes. (*People v. Griffin* (1967) 66 Cal.2d 459, 465.)

III. *Evidence of Incidents Before the Stalking Offense*

The trial court considered evidence of two incidents on dates that occurred before the stalking offense: July 20, 1994, when appellant retrieved a rifle, threatened to shoot Adams, and slapped her in the face; and December 15, 1994, when appellant came to Adams' residence,

shouted "Rambo," kicked down the front door, and grabbed and slapped Adams.

Appellant contends that the trial court's consideration of those events violates the rule that "a finding of ineligibility pursuant to section 1170.12, subdivision (c)(2)(C)(iii) cannot be made on the basis of conduct that occurred other than *during* the offense of conviction." (*People v. Estrada* (2017) 3 Cal.5th 661, 674.) Once again, appellant's analysis is faulty. The requirement is that the disqualifying factor of intent to cause great bodily injury must have been present "[d]uring the commission of the current offense" (§ 1170.12, subd. (c)(2)(C)(iii)), namely, his stalking offense between January 9 and January 26. However, in determining the intent with which defendant committed his stalking offense, nothing precluded the court from considering other conduct as circumstantial evidence relevant to inferring defendant's intent during the stalking offense. As we have already observed, other incidents of threats or violence between the defendant and the victim are relevant to prove the defendant's motive and intent with respect to the charged crime. (*Barnett, supra,* 17 Cal.4th at p. 1118.)

IV. *Harmless Error*

Finally, in any event, even if the trial court improperly considered evidence of the incidents of January 9 and 17, 1995, and July 20 and December 15, 1994, we find the error harmless. Even without consideration of those incidents, the incidents of January 12, 15, 18 and 24 constitute substantial evidence that appellant intended to inflict

great bodily injury on Adams during the stalking offense between January 9 and 26, 1995. On January 12, appellant drove head-on towards Adams car trying to run her off the road, and threatened to kill her. On January 15, appellant placed a red flare on Adams front porch, and told Adams by phone that he was going to kill her. On January 18, he told Adams by phone that would endanger everyone at her home. On January 24, 1:30 or 2:00 a.m., he threw a brick attached to a flare through Adams window, and told her by phone that she "should 'be glad it wasn't a cocktail' and that he would be back that night." In addition, appellant had been previously convicted of voluntary manslaughter and assault with a deadly weapon. This evidence was more than sufficient to support the finding that he intended to inflict great bodily injury on Adams while stalking her. Thus, it is not reasonably probable that in the absence of evidence of the incidents of January 9 and 17, 1995, and July 20 and December 15, 1994, a different result would have been reached. (*People v. Watson* (1956) 46 Cal.2d 818, 836; cf. *People v. Johnson* (2016) 1 Cal.App.5th 953 [applying harmless error analysis to asserted trial court error in limiting evidence of the defendant's eligibility for resentencing under Proposition 47, the Safe Neighborhoods and Schools Act of 2014 (§ 1170.18), to the defendant's record of conviction].)

V. *Consideration of Vacated Opinion*

In its ruling, the trial court relied in part on the analysis of the vacated opinion in *Schnikel v. Superior Court* (Sept. 12, 2014, C073404),

which had held that the crime of solicitation of murder necessarily includes the intent to cause great bodily injury, thereby making it an offense disqualified for resentencing under section 1170.126. Shortly before the hearing at issue in this appeal, the Supreme Court granted review of *Schnikel* on another issue (S221665), and later remanded the case for reconsideration under *People v. Johnson, supra,* 61 Cal.4th at page 688.[5]

Appellant suggests that the trial court's partial reliance on *Schnikel* was error because the decision has been vacated. The issue is beside the point. As we have stated, the trial court's finding that appellant intended to inflict great bodily injury on Adams is supported by substantial evidence, and any error in the court's consideration of purportedly improper evidence is harmless.

VI. *Inability to Confront Evidence*

Appellant contends that at trial, the question of his intent to inflict great bodily injury was not in issue, and therefore he lacked the incentive and opportunity to counter the evidence that he had the intent to inflict great bodily injury on Adams. On that basis, he contends that the trial evidence, purportedly untested by the adversary

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[5] *Johnson* held that "the [Three Strikes Reform Act] requires an inmate's eligibility for resentencing to be evaluated on a count-by-count basis. So interpreted, 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." (61 Cal.4th at p. 688.) That holding is not relevant to this appeal.

process, cannot support the trial court's finding on his petition for resentencing that he intended to inflict great bodily injury.

Given that the trial evidence showed that appellant repeatedly menaced and threatened to kill Adams, it is difficult to understand how appellant lacked the opportunity or motive to contest that he meant to harm her. Regardless, appellant's contention is contrary to the approved manner of resolving a petition for resentencing. "[A] resentencing proceeding under section 1170.126 necessarily looks backwards" (*Frierson, supra*, 4 Cal.5th at p. 238), and the trial court may rely on the record of conviction (*Bradford, supra,* 227 Cal.App.4th at pp. 1338-1339). That is what occurred here.

DISPOSITION

The order is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.