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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.

EDWARD MACIAS,

Defendant and Appellant.

B287199

(Los Angeles County
Super. Ct. No. VA097246)

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

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 Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Edward Macias petitioned for recall of sentence under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126).¹ The superior court denied the petition, finding Macias was ineligible for relief because his current sentence had been imposed for an offense committed with the intent to cause great bodily injury to another person. On appeal Macias contends the court erred in applying a preponderance-of-the-evidence, rather than the beyond-a-reasonable-doubt, standard of proof. The People concede the court erred in using a preponderance-of-the-evidence standard but argue the error was harmless because it is not reasonably probable that the court, employing the proper standard of proof, would not have ruled that Macias intended to cause great bodily injury when committing the underlying crime. We reverse and remand for a new eligibility hearing utilizing the proper standard of proof.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Commitment Offense

As Cynthia Moreno arrived at a laundromat in Whittier on September 16, 2006, she encountered Macias standing inside near the entrance. Moreno knew Macias from the neighborhood; the two occasionally said hello to each other. Macias asked Moreno if she had any spare change. She replied she did not and walked away. Approximately 15 minutes later Macias approached Moreno and, without speaking to her, grabbed her by the neck and threw her to the ground. He then stepped on Moreno and kicked her five to seven times on the back and neck. Macias stopped kicking Moreno only when a bystander

¹ Statutory references are to this code.

approached and told him to stop. Macias then calmly walked out of the laundromat.

After the attack Moreno was crying and holding her arm. She was helped into a chair by two bystanders, and paramedics were called. Moreno was taken to the hospital where she was examined and given pain medication.² During the trial four months later she testified she was still experiencing pain. Moreno also testified Macias did not speak to her immediately before or during the attack and she did not know why he attacked her. She said Macias was taller and substantially heavier than she was.

Shawna Divens was also at the laundromat on September 16, 2006. She testified Macias approached her and “made ridiculous comments” that she could not understand. Macias then left the laundromat. After 15 minutes Macias returned and “was walking straight forward as if he wasn’t going to do anything. And then suddenly he turned around, grabbed Mrs. Moreno by her neck, threw her to the ground, stepped on her and kicked her several times.”

Macias was located by police officers in a nearby parking lot approximately an hour after the incident. He initially told the police he had not been at the laundromat that day, but later said he had been there and had seen the assault. He said the assailant looked like him.

Macias testified in his own defense. He admitted having been in an altercation with Moreno at the laundromat, but claimed he had been defending himself. He said Moreno had

² The paramedics put a “head brace” on Moreno when taking her to the hospital. She did not use a head or neck brace thereafter.

been drunk and had asked him for money. When he refused to give her any, she got angry and punched him. He pushed her away, and she lost her balance and fell.

A jury found Macias guilty of assault by means likely to produce great bodily injury (former § 245, subd. (a)(1), now § 245, subd. (a)(4)). The trial court found true the special allegations Macias had suffered two prior strike convictions—one for robbery (§ 211) and one for making a criminal threat (§ 422). In denying Macias’s motion to dismiss one of the prior strike convictions, the court stated, “[Macias] did perjure himself on the stand. His testimony was fundamentally implausible and the jury didn’t buy it. . . . The officer who arrested him [after the assault] said he was totally coherent. And yet the defendant took the stand and said everything the officer said was a lie. . . . He contradicted the officer’s attributions to him as to the statements that he made. . . . This was a totally uncalled for, unjustified assault [in] this case. The independent witnesses were particularly credible.” The trial court sentenced Macias under the three strikes law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) to an indeterminate state prison term of 25 years to life. We affirmed the conviction and sentence on appeal. (*People v. Macias* (April 16, 2008, B197439) [nonpub. opn.].)

2. Macias’s Petition for Recall of Prison Sentence

On December 26, 2012 Macias 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).) Macias argued in his petition that his third strike conviction for aggravated assault rendered him eligible for recall of his sentence. On February 21, 2013 the trial court issued an order to show cause why the petition should not be granted.

The People opposed the petition, asserting Macias 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).) In response Macias argued the prosecution had not sought to prove an allegation he had inflicted, or intended to inflict, great bodily injury during his attack on Moreno. He further argued he had not intended great bodily injury, and he stopped the attack and left the laundromat before any likelihood of great bodily injury arose.

Following a hearing the superior court found by a preponderance of the evidence that Macias was ineligible for resentencing because he had intended to cause great bodily injury to Moreno during the assault. The court discharged the order to show cause and denied Macias’s petition.

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 Trial Court Employed an 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 Macias’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 Macias had committed the assault with the intent to cause great bodily injury to Moreno, thus making him ineligible for resentencing under Proposition 36.

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 Matter Must Be Remanded for a New Hearing Employing the Correct Standard of Proof

The People concede the superior court erred when it employed a preponderance standard of proof in determining Macias was ineligible for relief under section 1170.126, subdivision (e)(2), but contend the error was harmless because it is not reasonably probable the court using the heightened,

reasonable doubt standard of proof would not have found that Macias intended to cause great bodily injury during the assault.³

Section 12022.7, subdivision (f), defines great bodily injury as a “significant or substantial physical injury.” Although minor or moderate harm is insufficient to constitute great bodily injury (see CALCRIM No. 3163), “the injury need not be so grave as to cause the victim “permanent,” “prolonged” or “protracted” bodily damage.” (*People v. Cross* (2008) 45 Cal.4th 58, 64.) “[T]he intent to inflict [great bodily] injury may be shown by, and inferred from, the circumstances surrounding the doing of the act itself.” (*People v. Phillips* (1989) 208 Cal.App.3d 1120, 1124; see also *People v. Massie* (2006) 142 Cal.App.4th 365, 371 [“[t]he intent with which a person acts is rarely susceptible of direct proof and usually must be inferred from facts and circumstances surrounding the offense”]; *In re Sergio R.* (1991) 228 Cal.App.3d 588, 601 [“[t]he intent to inflict great bodily injury need not be proven by direct evidence. Such intent may be inferred or presumed. “It is black-letter law that a party is presumed to intend to do that which he voluntarily or willfully does in fact do and also presumed to intend the natural, probable and usual consequences of his own acts””].) An individual’s “intent ‘is a question of fact to be determined from all the circumstances of the case’” (*Hudson v. Superior Court* (2017) 7 Cal.App.5th 1165, 1171.)

³ Because use of the beyond-a-reasonable-doubt standard is based on state law (*Frierson, supra*, 4 Cal.5th at pp. 235-239), the superior court’s error is evaluated under the harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836.

The record reflects Macias's unprovoked attack was serious. However, he made no threats or other comments indicating his intent immediately before or during the brief assault. Moreover, although Moreno was still experiencing pain four months later, her injuries were relatively minor, treated at the hospital only with pain pills. The testimony indicated Macias's demeanor that day had been inconsistent—he was speaking incoherently prior to the attack, acted erratically during the attack, and was calm immediately after the attack and when questioned by police officers. Macias also gave three conflicting accounts of his involvement in the attack, first telling police he had not been at the laundromat that day, then stating he had been there but had not been involved in the incident and finally testifying at trial that he had been in an altercation with Moreno but she had initiated it.

Although the superior court could certainly infer from this evidence that Macias intended to cause Moreno great bodily injury, there is a reasonable probability a finder of fact authorized to weigh credibility and determine state of mind, which we are not, would conclude the requisite intent had not been proved beyond a reasonable doubt. That determination is properly made by the superior court in the first instance.

DISPOSITION

The order is reversed, and the matter remanded with directions to conduct a new evidentiary hearing utilizing the proper standard of proof as established in *Frierson, supra*, 4 Cal.5th 225.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.