Filed 11/22/16 P. v. Rodriguez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OSCAR RODRIGUEZ, Defendant and Appellant.	B269444 (Los Angeles County Super. Ct. No. GA025346)

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

California Appellate Project, Jonathan B. Steiner, Executive Director, and Cheryl Lutz, Staff Attorney, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah Hill and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Oscar Rodriguez appeals from the postjudgment order denying his petition to recall his sentence and for resentencing pursuant to Penal Code section 1170.126,[1] added by Proposition 36.[2] He contends the Proposition 36 court erred in finding he was ineligible for resentencing based on its finding he intended to inflict great bodily injury, because: (1) the court improperly made factual findings beyond those that establish the nature or basis of his current conviction in violation of *People v. Guerrero* (1988) 44 Cal.3d 343 (*Guerrero*); and (2) the court applied the incorrect preponderance of the evidence rather than the correct beyond a reasonable doubt standard of proof.

We affirm the order. The Proposition 36 court found that during the commission of the current offense, the defendant intended to cause great bodily injury, which is an expressly enumerated factor for disqualifying, or rendering ineligible, a defendant for Proposition 36 relief (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)). This finding is legally sound. Defendant's reliance is misplaced on *Guerrero*, which is factually inapplicable. The court correctly applied the lesser preponderance of the evidence rather than the greatest beyond a reasonable doubt standard of proof.

---

[1] All further section references are to the Penal Code unless otherwise indicated.

[2] "On November 6, 2012, the electorate passed Proposition 36, the Three Strikes Reform Act of 2012 . . . . Proposition 36 reduced the punishment to be imposed with respect to some third strike offenses that are neither serious nor violent, and provided for discretionary resentencing in some cases in which third strike sentences were imposed with respect to felonies that are neither serious nor violent." (*People v. Johnson* (2015) 61 Cal.4th 674, 679.) Proposition 36 was effective on November 7, 2012. (*Johnson*, at p. 680.)

BACKGROUND

On June 12, 1995, at a park in Rosemead, defendant punched Estella Arias, his live-in girlfriend, several times in the face and forehead after they had been drinking. Arias, who was treated at the scene by paramedics, told Los Angeles County Sheriff's Detective Baltzar that defendant attacked her because he was angry that she was talking to her friends and that he hit her whenever he drank alcohol.

On August 26, 1995, at about 2:30 a.m., Arias refused defendant's offer to smoke marijuana. He then hit her head repeatedly against a store window, causing it to shatter and causing injuries to Arias's head and left ear. When she tried to run away, defendant grabbed her and bit her on her back.

At trial, after admitting causing injuries to Arias, he explained Arias was leaving her children to be with friends. He described the accusations against him as lies. He denied punching Arias during the June 12 incident. Rather, he grabbed her, because she was drunk and wanted to stay at the park with friends and drug addicts. As he was helping Arias, she fell and was injured. Similarly, during the August 26 incident, he was trying to help Arias because she was very drunk and in grabbing Arias, he hurt her. He denied pushing Arias against the window or biting her on her shoulder.

A jury convicted defendant of two counts of willful infliction of corporal injury on a cohabitant (§ 273.5, subd. (a)) and found he had suffered two strikes under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). The trial court reduced one count to a misdemeanor. Defendant was sentenced to prison to 25 years to life on his felony conviction and sentenced to a consecutive one-year jail term for his misdemeanor conviction.

In his earlier appeal, we modified the judgment to reflect his sentence of 25 years to life is on count 1 and that count 2 is the count that was reduced to a misdemeanor and on which the one-year sentence was imposed. As modified, we affirmed the judgment.[3]

On January 13, 2013, defendant filed a Proposition 36 petition to recall his sentence and for resentencing.

On February 27, 2013, the Proposition 36 court issued an order to show cause. The People filed opposition to the petition.

On November 25, 2014, defendant filed a reply.

On June 9, 2015, the People filed supplemental opposition.

On December 1, 2015, the Proposition 36 court issued a memorandum of decision. The court found defendant was not eligible for relief, because he had intended to inflict great bodily injury during commission of the current crime and denied the petition.[4]

DISCUSSION

1. *Jury's Verdict Does Not Preclude Intent Finding by Proposition 36 Court*

Defendant contends the Proposition 36 court's own factual finding that defendant intended to inflict great bodily injury is unsupported by the record

---

[3] The above background is taken from the earlier unpublished opinion (B102447), of which we take judicial notice. (Evid. Code, §§ 452, subd. (d)(1), 459.)

[4] On October 26, 2015, at the conclusion of the eligibility hearing, the Proposition 36 court ruled: "The motion [*sic*] is denied." The court did not consider its oral ruling to be the final order, because in its memorandum of decision, the court did not mention this oral ruling and the memorandum of decision reflects the court expressly ruled the Proposition 36 petition was denied with prejudice.

of conviction, i.e., the jury's verdict, and that the court's "'relitigation' of the circumstances of the crime" is prohibited under *Guerrero*, *supra*, 44 Cal.3d 343, 355. We find his contention to be without merit.

The fatal fallacy lies in his misguided focus on "the 'nature or basis of the verdict." That the jury did not find defendant intended to inflict great bodily injury is inconsequential. In *People v. Newman* (2016) 2 Cal.App.5th 718 (*Newman*),[5] this court explained a disqualifying factor, such as the one here, is "not a subject for a jury to determine, because [such factors] do not cause an *increase* in punishment beyond the statutory punishment for the current offense." Rather, "the existence of a disqualifying factor that would render a defendant ineligible for resentencing under Proposition 36, which would lessen his punishment if he were eligible, is a determination solely within the province of the Proposition 36 court to make." (*Newman*, at. p. 724.) Further, we explained that *Guerrero* is factually inapplicable. "*Guerrero*, which was decided long before enactment of Proposition 36, concerns what evidence a trial court may consider in determining the truth of a *prior conviction* allegation." (*Newman*, at. p. 726.)

2. *Preponderance of the Evidence Is the Applicable Standard of Review*

Defendant contends the Proposition 36 court applied the incorrect standard of proof in making its factual findings, because the appropriate standard is beyond a reasonable doubt, as enunciated by the court in *People v. Arevalo* (2016) 244 Cal.App.4th 836, not preponderance of the evidence.[6] We are not persuaded.

---

[5] On September 28, 2016, a petition for review was filed in *Newman* (S237491).

[6] Defendant does not challenge the sufficiency of the evidence to support the Proposition 36 court's finding he intended to inflict great bodily injury

In *People v. Frierson* (2016) 1 Cal.App.5th 788,[7] the court disagreed with *Arevalo* and concluded the correct standard of proof is preponderance of the evidence. (*Frierson*, at pp. 793, 794.) In *Newman*, this court concurred with that conclusion. We noted "beyond a reasonable doubt, the highest standard of proof, implicates issues regarding guilt or innocence of a charged crime but not sentencing," as a general matter, unless the issue involves a factual finding that might subject a defendant to a potential sentence greater than that authorized by the verdict of the trier of fact itself. (*Newman*, *supra*, 2 Cal.App.5th at p. 731.) We held the preponderance of the evidence standard applies, because "Proposition 36 operates to decrease a defendant's punishment, not to increase the 'penalty for a crime beyond the prescribed statutory maximum'" (*id.* at p. 732), the scenario in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) Defendant offers nothing new or different that would warrant revisiting our conclusions in *Newman*.

---

during the commission of the current crime under the preponderance of the evidence standard. Rather, he simply contends "[i]f tested by the beyond a reasonable doubt standard, these facts leave plenty of room for a finding that while [he] assaulted Arias, he may not have intended to injure her greatly." We need not, and therefore do not, address this contention in view of our conclusion that the lesser preponderance of the evidence rather than the greatest beyond a reasonable doubt standard of proof applies.

[7] A petition for review was granted in *Frierson* on August 22, 2016 (S236728).

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

BOREN, P.J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.