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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WARNER LIVINGSTON,

Defendant and Appellant.

B281570

(Los Angeles County  
Super. Ct. No. GA022315)

APPEAL from an order of the Superior Court of Los Angeles County, Terry Lee Smerling, Judge. Affirmed in part and reversed in part and remanded.

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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, Assistant Attorney General, Noah P. Hill and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Warner Livingston challenges the trial court's order denying his petition for recall of his sentence pursuant to section 1170.126 (Proposition 36). The trial court found that he was ineligible for resentencing on his conviction of evading the police because he was armed during the commission of that offense. (See Pen. Code, §§ 1170.126, subd. (e)(2), 667, subd. (e)(2)(C)(iii).)<sup>1</sup> Appellant argues that insufficient evidence supported the court's finding that he was armed. We disagree and affirm as to his evading conviction, but reverse and remand for the trial court to reconsider its order on the application of Proposition 36 to appellant's conviction for false imprisonment.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On the afternoon of December 10, 1994, appellant robbed a bank in Arcadia using a gun. During the robbery, appellant placed the gun on a counter to collect the money from a teller's cash drawer, and then picked up the gun before he left the bank. At least one teller, Jose Ramos, saw appellant take the gun with him as he fled the bank. Ramos followed appellant outside the bank to see which direction he fled. Ramos did not see appellant discard the gun at any time and observed appellant until the police arrived several minutes later.

When police arrived at the bank, Ramos directed an officer to where appellant stood next to the driver's side of a blue Chevy Caprice. As the officer made a U-turn in his patrol car, appellant got into the vehicle and drove away. Another officer approached from the opposite direction and positioned his patrol car directly in the path of appellant's vehicle. Appellant accelerated his car

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

toward the patrol car, struck it and then drove off, traveling another mile before crashing into a parked car. Appellant exited his vehicle and ran away. Except for the seconds it took the police officers to turn their car around, they maintained visual contact with appellant during the pursuit. The officers did not see appellant discard a weapon from his car, and no gun was found in the car when police searched it.

Bernard McCarthy saw appellant's car which had crashed in front of his driveway and a police car in his driveway. McCarthy walked outside, and an officer told McCarthy to go back into the house. As McCarthy retreated, appellant grabbed him. When McCarthy resisted, appellant told him to "get in the house." And although McCarthy did not see appellant's weapon, appellant told McCarthy that he had a gun. McCarthy eventually managed to escape from appellant.

Appellant refused to surrender to police; he remained inside McCarthy's residence for the next seven hours. Police eventually took appellant into custody around 11:00 p.m. that evening. Although police searched the car and appellant, they never found a gun.

In 1995, a jury convicted appellant of six counts of robbery (§ 211; counts 1, 2, 4, 5, 11, 12), second-degree commercial burglary (§ 459; count 6), grand theft of personal property (§ 487, subd. (a); count 9), each with the personal use of a firearm allegation (§ 12022.5, subd. (a)(1)). The jury also convicted appellant of attempted false imprisonment of a hostage (§§ 210.5, 664; count 7), evading an officer while driving recklessly (Veh. Code, § 2800.2; count 8), and possession of a firearm by a felon (§ 12021, subd. (a)(1); count 10). The court sentenced appellant under the "Three Strikes" law to an

indeterminate term of 210 years to life, consisting of: eight consecutive terms of 25 years to life for the attempted false imprisonment of a hostage, evading an officer while driving recklessly, and six counts of robbery, as well as two consecutive five-year enhancements for the prior convictions under section 667.5, subdivision (a)(1). Pursuant to section 654, the court stayed imposition of sentence on the commercial burglary, grand theft, and being a felon in possession of a firearm convictions.<sup>2</sup>

In February 2013, appellant filed a petition for recall and resentencing under Proposition 36. The court denied the petition in March 2013 because the robbery convictions qualified as serious felonies.

Thereafter, in July 2015, following the decision in *People v. Johnson* (2015) 61 Cal.4th 674 (*Johnson*),<sup>3</sup> appellant

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<sup>2</sup> Appellant appealed twice, and this court affirmed the judgment (case No. B099526 and case No. B1654793). Appellant also filed for a petition for writ of habeas corpus (case No. B152033), and this court vacated for resentencing. At resentencing, appellant was given a total indeterminate term of 95 years to life, consisting of: 25 years to life for one of the six robberies (count 1), a consecutive term of 25 years to life for the attempted false imprisonment of a hostage (count 7), and a consecutive term of 25 years to life for evading an officer while driving recklessly (count 8), plus a 10-year firearm use enhancement and two 5-year terms under section 667.5, subdivision (a)(1). The court imposed concurrent sentences on all other counts.

<sup>3</sup> In *Johnson* the Supreme Court held that a defendant with serious and non-serious felonies is eligible for resentencing on the non-serious felonies notwithstanding a conviction of a serious felony. (*Johnson, supra*, 61 Cal.4th at p. 688.)

filed another petition seeking recall of his convictions for attempted false imprisonment (count 7) and evading arrest (count 8). The trial court vacated the March 2013 order and issued an order to show cause why relief should not be granted. Following a hearing on the petition, the court determined that the conviction for attempted false imprisonment (count 7) was eligible for recall and resentencing pursuant to section 1170.126. The court, however, determined that appellant was ineligible for recall and resentencing on the conviction of felony evading arrest, finding that appellant was armed with a firearm during the commission of that offense.

Appellant timely filed a notice of appeal.

### **DISCUSSION**

Appellant asserts that the evidence did not support the court's finding that he was armed with a gun during the commission of the evading arrest, and thus the trial court erred when it determined him ineligible for resentencing under Proposition 36. Respondent disagrees, arguing that the court could reasonably infer from the record that appellant possessed a gun while evading the police. Respondent also asserts that the court erred in concluding that appellant was eligible for resentencing on false imprisonment.<sup>4</sup> As discussed below, we agree with respondent.

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<sup>4</sup> Appellate review is authorized where, as here, the People first seek review of the trial court's action in the respondent's brief. (Pen. Code, § 1252 ["On an appeal by a defendant, "the appellate court shall, in addition to the issues raised by the defendant, consider and pass upon all rulings of the trial court adverse to the State which it may be requested to pass upon by

In 2012, the voters approved Proposition 36, which amended the Three Strikes law. (See § 1170.126.) As amended, the law requires a court, upon a defendant’s petition, to recall and resentence a defendant as a second-strike offender if his commitment offense was not a serious or violent felony, none of the enumerated disqualifying circumstances apply, and such resentencing would not pose an unreasonable risk to public safety. (*Id.*, subds. (e) & (f).) One of the disqualifying factors is when a defendant was “armed with a firearm” during his commitment offense. (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) A person is armed with a firearm during a crime when he has ready access to a gun for offensive or defensive purposes. (*People v. Bland* (1995) 10 Cal.4th 991, 997.)

In determining whether a prior conviction is eligible for resentencing under Proposition 36, a trial court is not limited to considering the minimal facts established by the elements of the offense of which the inmate was convicted. Instead, to determine eligibility, a trial court should examine the full record of the conviction. (*People v. Guilford* (2014) 228 Cal.App.4th 651, 660.) We review the trial court’s findings for substantial evidence. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286.) Under this standard, we do not reweigh the evidence or resolve evidentiary conflicts. Rather, we examine the evidence, both direct and circumstantial, in light of the entire record and accept all logical inferences in favor of the findings. (*People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

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the Attorney General.”]; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1078.)

Before assessing the merits of the parties' respective contentions on appeal, we address appellant's assertion that the trial court applied the wrong standard of proof. The Supreme Court recently confirmed that the appropriate standard for a trial court to apply in determining disqualifying facts is that they must be established "beyond a reasonable doubt." (*People v. Frierson* (Dec. 28, 2017, S236728) \_\_Cal.5th\_\_ [2017 WL 6614838 at \*3].) Appellant claims, however, that the trial court applied the "preponderance" of the evidence standard of proof rather than the proof "beyond a reasonable doubt" standard. We disagree. The court stated it was applying the "beyond a reasonable doubt" standard when discussing whether appellant was eligible for resentencing on false imprisonment. Although it never said what standard it was applying to evading, nothing in the record or logic requires us to assume that the court abandoned the correct standard when considering the same legal issue.

Based on our review of the record, we conclude substantial evidence supported the trial court's factual finding that appellant was armed with a firearm during the commission of the evading offense. Appellant was armed with a gun when he robbed the bank, and he was still armed with the gun when he fled the bank. Appellant was observed nearly the entire time after he left the bank until he crashed his car in front of McCarthy's house. At no time before or while he was evading the police was appellant seen discarding the weapon. Also, when he kidnapped McCarthy, appellant claimed that he had a gun. From this evidence, the trial court could reasonably infer that appellant was armed with a weapon when he evaded police. And although appellant argues that because he was not observed holding the gun after the robbery and that the gun was never found supports an inference

that he discarded the weapon *before* he evaded arrest, the trial court was not required to accept appellant's interpretation when the facts supported a contrary version of events as well.

With respect to the application of Proposition 36 to false imprisonment, respondent asserts that the trial court erred when it found appellant eligible for relief based on its conclusion that the jury's "not true" finding on a firearm use enhancement (§ 12022.5) related to count 7 precluded it as a matter of law from making a determination that appellant was armed with a firearm during the commission of that offense. As the Attorney General correctly points out, a jury's determination that a defendant did not *use* a firearm during an offense is distinct from a determination that a defendant was armed with a firearm during an offense for Proposition 36. A jury's "not true" finding on a weapon use enhancement does not, as a matter of law, prohibit a subsequent determination that the defendant was armed with that same weapon for the eligibility determination under Proposition 36. (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1112 ["Because Proposition 36 looks to whether appellant was armed 'during' the false imprisonment rather than 'in the commission of it,' the not true finding on the weapon use enhancement does not render appellant eligible for resentencing"].)

The trial court concluded that the jury's "not true" finding on the firearm use enhancement made defendant eligible as a matter of law for resentencing on the false imprisonment count under Proposition 36. That conclusion, however, does not recognize that defendant could have been armed with a firearm—as opposed to having used a firearm—when he kidnapped McCarthy. A finding that defendant was armed with a firearm



would make him ineligible for resenting under Proposition 36. Consequently, the trial court's order granting appellant's petition for recall and resentencing on his conviction for false imprisonment alleged in count 7 cannot stand.

### **DISPOSITION**

The order granting appellant's petition for recall and resentencing for false imprisonment alleged in count 7 is conditionally reversed. On remand, the court is directed to reconsider appellant's eligibility for resentencing on this count, before proceeding with a suitability hearing under section 1170.126, subdivisions (f) and (g). If the court finds him ineligible, it shall vacate its order granting the petition for recall and resentencing on that count. The order is affirmed in all other respects.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

BENDIX, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.